No. 80-1684

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEAT, MARWICK, MITCHELL & Co.,
ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Petitioners,

v.

WACHOVIA BANK AND TRUST Co., N.A., MELLON BANK, N.A., FIRST WISCONSIN TRUST Co., THE DREYFUS OFFSHORE TRUST, N.V., and NATIONAL FIRE INSURANCE Co. OF HARTFORD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 1981

Questions Presented

1. May a federal court create a damage remedy under § 17(a) of the Securities Act of 1933 or § 10(b) of the Securities Exchange Act of 1934 for purchasers of securities who cannot establish the elements of any of the express causes of action which those Acts provide injured securities purchasers?

2. May a litigant avoid the retroactive effect of a previous decision when he is unable to show that all three factors of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), favor prospective-only effect?

Parties Below

Plaintiffs-appellants-cross appellees in the court of appeals were Wachovia Bank and Trust Co., N.A., Mellon Bank, N.A., First Wisconsin Trust Co., The Dreyfus Offshore Trust, N.V., and National Fire Insurance Co. of Hartford. The defendants-appellees-cross-appellants were Cortes W. Randell, James F. Joy, Roger O. Walther, Peat, Marwick, Mitchell & Co., Anthony M. Natelli, Joseph Scansaroli, Donald A. Fergusson, Robert A. Fergusson, White & Case and Marion J. Epley, III. The defendants-appellees were John G. Davies, Bernard J. Kurek and Dennis M. Kelly.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Opinions Below

The opinion of the court of appeals (set forth beginning at page 1a of the appendix to this petition) is not yet officially reported; it is unofficially reported at [1980] CCH Fed.Sec.L.Rep. ¶ 97,712. The opinion of the district court (set forth beginning at page 38a of the appendix) is reported at 461 F.Supp. 999.

Jurisdiction

The judgment of the court of appeals was entered December 5, 1980. Petitioners' timely petition for rehearing,

with suggestion for rehearing *en banc*, was denied without opinion on March 4, 1981 (Circuit Judges Robb and MacKinnon would have heard the case *en banc* and Circuit Judge Wright did not participate) (66a-67a). This petition is filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutory Provisions

Sections 5, 11, 12, 13, 16 and 17 of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77e, 77k. 77l, 77m, 77p, 77q (1976), and Sections 9, 10, 18 and 28(a) of the Securities Exhange Act of 1934 (the "1934 Act"), 15 U.S.C. §§ 78i, 78j, 78r, 78bb(a) (1976), are set forth in the appendix beginning at page 68a.

Statement of the Case

National Student Marketing Corporation ("NSMC") was one of the "hot new issues" of the 1968-1969 stock market, chronicled in Brooks, *The Go-Go Years* (1973). Its stock was offered to the public in April 1968 at $6 and sold at $14 the same day. By December 1969, the stock, which had been split 2 for 1, was selling at $70, or 100 times earnings. Mr. Brooks explains that NSMC's president was able to fool "the whole brains trust of institutional investing" because "he was plausible and they were gullible as well as greedy; that, in times of speculative madness, the wisdom and experience of the soundest and soberest may yield to a hysteria induced by the glimpse of fool's gold dished by a young man with a smile on his lips and a gleam in his eye" (*id.* at 285).

In December 1969, Wachovia Bank and Trust Co., N.A., Mellon Bank, N.A., First Wisconsin Trust Co., The Drey-

fus Offshore Trust, N.V., and National Fire Insurance Co. of Hartford (collectively "Wachovia Bank") purchased some 130,000 shares of NSMC's stock from NSMC and two of its controlling persons. The purchase was made at a 37% discount from the market price of the stock. Within days, the market price began a precipitous decline and by the end of March 1970 had dropped by over 90%.

Peat, Marwick, Mitchell & Co. ("PMM") was the independent auditor of NSMC. PMM examined and reported upon the financial statements of NSMC which NSMC filed with the Securities and Exchange Commission ("SEC").*

Wachovia Bank sued NSMC, the selling shareholders, PMM and others in January 1973 and in 1975 added White & Case, counsel for NSMC in connection with the Wachovia Bank purchase, and its partner Epley as defendants. Wachovia Bank alleged that financial disclosures by NSMC including the financial statements examined and reported upon by PMM overstated NSMC's financial position and results of operations. The action asserted causes of action "implied" under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act. The district court was alleged to have jurisdiction by reason of § 22 of the 1933 Act and § 27 of the 1934 Act.**

The express causes of action

Section 5 of the 1933 Act requires that securities sold by an issuer (including, for this purpose, controlling persons of an issuer) be registered with the SEC by a regis-

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* Petitioners Natelli and Scansaroli were, respectively, a partner and an employee of PMM.

** Wachovia Bank also alleged causes of action "implied" under §§ 13(d) and 14(a) of the 1934 Act. The § 13(d) claim was abandoned (43a n.10), and Wachovia Bank did not appeal from the dismissal of the § 14(a) claim (8a n.6).

tration statement containing prescribed information including financial statements. Section 11(a)(3) provides an express damage remedy for purchasers of securities against the independent auditor in the event the financial statements contained in the registration statement are misleading.

Wachovia Bank contracted away that remedy. Wachovia Bank made representations in its stock purchase agreement concerning investment intent so that the transaction, as a "private placement", would be exempt from the registration requirement. Accordingly, no registration statement was filed.

Section 12(2) of the 1933 Act provides an express damage or rescission remedy for purchasers of securities (whether or not registered pursuant to § 5) if the securities are sold by means of a misleading statement. The purchaser's remedy is against the seller, not against other persons such as the independent auditor.

Other purchasers of NSMC stock brought a rescission action pursuant to § 12(2) against NSMC in March 1970. That action was later settled and the purchasers received back the stock they had exchanged for NSMC stock. Wachovia Bank did not utilize the § 12(2) remedy against NSMC or the selling stockholders from whom it purchased.

Section 9(a)(4) of the 1934 Act prohibits misleading statements by brokers and by sellers which are made for the purpose of inducing purchases of a security listed on an exchange, and § 9(e) provides an express damage remedy for persons who purchase such securities at a price affected by the misstatement. The stock of NSMC was not listed on a stock exchange.

Section 18 of the 1934 Act provides an express damage remedy for purchasers of securities, whether or not listed

on an exchange, against those, including the independent auditor, who make or cause to be made misleading statements which are contained in documents filed with the SEC. Reliance upon the misleading statement is an element of the cause of action.

Wachovia Bank has disclaimed any reliance upon the NSMC financial statements which were reported upon by PMM and which were filed with the SEC.*

Sections 13 of the 1933 Act and 18(c), as well as 9(e), of the 1934 Act require that any suit upon the express causes of action be brought within one year of discovery of the wrongful conduct or three years from the purchase complained of.

In early January 1970, within weeks of the stock purchase, internal counsel for one of the Wachovia Bank purchasers "turn[ed] the matter over to our counsel for litigation." The court of appeals held that equitable tolling of any limitations period insofar as PMM is concerned ended in February 1970. Wachovia Bank did not, however, bring suit until January 1973, 37 months after the purchase of the NSMC stock and at least 35 months after Wachovia Bank was on notice of a claim against PMM concerning the financial statements of NSMC.

Sections 16 of the 1933 Act and 28(a) of the 1934 Act provide that the express remedies of the Acts are in addition to any remedies available at common law. Wachovia Bank did not pursue any common law remedy against PMM.

PMM moved to dismiss the complaint on the grounds (i) that in the circumstances § 10(b) of the 1934 Act and

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* The Wachovia Bank complaint pleaded reliance, but the courts below accepted Wachovia Bank's disclaimer of reliance made by affidavit in response to PMM's motion to dismiss.

§ 17(a) of the 1933 Act did not provide an "implied" damage remedy for Wachovia Bank and alternatively (ii) that under the ruling of the court of appeals in *Forrestal Village, Inc.* v. *Graham*, 551 F.2d 411 (D.C. Cir. 1977), the two-year statute of limitations of the District of Columbia "blue sky" law applied to such claims and barred Wachovia Bank's action commenced more than three years after its purchase.

The decisions below

The district court held that Wachovia Bank might assert "implied" causes of action under § 10(b) of the 1934 Act and § 17(a) of the 1933 Act since "it appears that neither § 18(a) [of the 1934 Act] nor § 12(2) [of the 1933 Act] provides the plaintiffs with adequate remedies" (47a). The district court, however, dismissed the complaint as time-barred (57a-62a).

The court of appeals affirmed the holding that Wachovia Bank has an "implied" damage remedy under § 10(b). The court declined to reach the question of whether Wachovia Bank has an "implied" remedy under § 17(a) of the 1933 Act (18a n.19).*

The court said that the inquiry concerning legislative intent is "not necessarily for evidence that Congress specifically intended to imply a private right of action, but rather for indications whether Congress meant to deny such a remedy" (21a). The court said that a § 10(b) damage remedy "compensates the investors," "affords a broad deterrent force against the fraud that the statute condemns" and is "a necessary supplement to administrative

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* There can be little doubt but that under this Court's recent rulings there is no private damage remedy under § 17(a). Since it is difficult to distinguish § 10(b) from § 17(a), it was no doubt easier for the court of appeals not to deal with § 17(a).

enforcement" of the federal securities laws by the SEC (22a).

The court recognized that this Court has left open the question whether a cause of action may be implied under § 10(b) for actions and transactions which are the subject of express remedy provisions.

> "The Supreme Court has never decided whether the existence of express remedies precludes implication of a private right of action, and it specifically left the issue open in *Hochfelder,* 425 U.S. at 211 n.31, and in *Blue Chip Stamps,* 421 U.S. at 752 n.15. Dicta in *Redington* expressing reluctance to create an additional remedy when express remedies are already provided is [*sic*] not controlling in this case. In *Redington,* while the Court declined to decide the issue, *see* 442 U.S. at 574, it did note the existence of legislative history supporting a finding that the express remedies were intended to be exclusive, *see* 442 U.S. at 574." (28a n.29)

The court nevertheless and inexplicably said as to the legislative history referred to in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979), that "no such evidence exists here" (28a n.29).

The court held that the express remedies could be ignored because such remedies were "not available" (34a) to Wachovia Bank: the express cause of action under § 11 of the 1933 Act was not available because "no registration statement was filed, and the suit was brought well beyond the time allowed under section 11" (29a); the express cause of action under § 12(2) of the 1933 Act was not available because of "section 12(2)'s short statute of limitations and apparent restriction of defendants to sellers" (31a); the

express cause of action under § 18 of the 1934 Act was not available because § 18 requires "actual reliance" (32a) and "plaintiffs have not claimed reliance" (34a). A § 18 cause of action also was time-barred under § 18(c). The court did not mention the express remedy of § 9(e) of the 1934 Act, which also was "not available." The court concluded:

> "Even if we were inclined to hold that the express remedies were intended to be exclusive, they should only preclude implied causes of action in those cases in which they truly constitute 'remedies.' . . ."
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> "Appellants should, therefore, be able to maintain a cause of action under section 10(b), the only true relief available to them." (33a, 35a)

In its reference to the "only true relief available to" Wachovia Bank, the court ignored the common law remedies available under state law.

In fashioning an "implied" federal remedy for Wachovia Bank the court eliminated the reliance and statute of limitations elements of the express federal remedies because those elements made the express remedies unavailable to Wachovia Bank. It said that the § 10(b) remedy "presumes reliance if the omission is material or if the misstatement affects the price of the stock" (32a), and it applied the local statute of limitations governing common law actions for fraud (14a) (although common law remedies were otherwise ignored).

The court of appeals reversed the dismissal of the Wachovia Bank action as time-barred, concluding that it was error to apply its decision in *Forrestal Village, supra,* "retroactively" to Wachovia Bank's action. Although it said the shorter "blue sky" statute "best furthered federal policy" (14a), it said that this second factor of *Chevron*

Oil Co. v. *Huson*, 404 U.S. 97 (1971), was "outweighed" by the first and third factors (13a). It held that, with the benefit of "equitable tolling" (15a-16a), the Wachovia Bank § 10(b) action was timely.

Reasons for Granting the Writ

1. *The "implied" remedy*—The court of appeals recognized how frequently this Court has been called upon to "decide whether a private remedy is implicit in a statute not expressly providing one," quoting from *Touche Ross & Co.* v. *Redington*, 442 U.S. at 562 (23a). It went on to say, however, and it is at the heart of its decision and why the writ should issue: "But the Court did not announce that it was going out of the business." (23a)

The court of appeals misunderstood or rejected the meaning of this Court's decisions, and it is not alone among the lower courts. The most recent weekly edition of the CCH Federal Securities Law Reports contains two decisions "implying" causes of action under § 13(e) of the 1934 Act and Rule 10b-16 under that Act; a third decision establishing a rule of damages in yet another "implied" action under § 14(e) of the 1934 Act; and a fourth decision fixing the amount of attorneys' fees in an "implied" action under § 10(b) of the 1934 Act. CCH Fed.Sec.L.Rep., Report No. 907 (April 1, 1981).

The writ should issue so that the lower courts may be reminded of the separation of legislative and judicial functions established by the Constitution and so that once and for all the existence and elements of "implied" remedies under §§ 10(b) and 17(a) may be settled.*

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* The question has been the subject of mounting litigation in the lower courts. *See, e.g.*, the decisions cited by the court of appeals at 34a n.34, 28a n.28 and *Poller* v. *First Virginia Mortgage and*

The Court has three times expressly left open the question of whether there is an "implied" remedy under § 17(a) of the 1933 Act. Does § 17(a) "in light of the express civil remedies of the 1933 Act [give] rise to an implied cause of action," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 734 n.6 (1975), or provide "private parties with an implied cause of action for damages," *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 557 n.9 (1979)? Most recently, in *Aaron* v. *SEC*, 446 U.S. 680, 689 (1980), the Court said "it has not had occasion to address the question whether a private cause of action exists under § 17(a)."

As to §10(b) of the 1934 Act, the Court has said that it has "recognized an implied cause of action under [§ 10 (b)] in some circumstances," *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477 (1977). It has "assumed" the existence of the "implied" cause of action, *Aaron* v. *SEC*, 446 U.S. at 689, but "whether a cause of action exists" is a question the answer to which "may be assumed without being decided," *Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979).

The Court has never sustained the § 10(b) claim of a purchaser such as is present here. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), involved an injured seller who has no remedy under the

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REIT, [1978] CCH Fed.Sec.L.Rep. ¶ 96,564 at 94,352 (E.D.Va. 1978); *Clayton* v. *Skelly Oil Co.*, [1977-78] CCH Fed.Sec.L.Rep. ¶ 96,269 at n.1 (S.D.N.Y. 1977); *Abrams* v. *Johns-Manville Corp.*, [1979-80] CCH Fed.Sec.L.Rep. ¶ 97,305 (S.D.N.Y. 1980); *Seiffer* v. *Topsy's International, Inc.*, 487 F.Supp. 653, 662 (D.Kan. 1980).

For reasons which presumably include the settlement value of the mere existence of the issue, the issue has not often reached courts of appeals. *See*, however, *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 429 n. 6 (6th Cir.), *cert. denied*, 101 S.Ct. 795 (1980); *Ross* v. *A.H. Robins Co.*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980); *Heizer Corp.* v. *Ross*, 601 F.2d 330, 335 (7th Cir. 1979).

1933 Act, as did *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).

The Court has not sustained an implied remedy which is broader than the remedy provided by Congress. To the contrary, in *Blue Chip Stamps*, 421 U.S. at 736, the Court said:

> "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action [under § 10(b)] beyond the bounds it delineated for comparable express causes of action."

Similarly, in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 574:

> "[W]e are extremely reluctant to imply a cause of action . . . that is significantly broader than the remedy that Congress chose to provide."

But the court below did exactly that, and it did so in the face of legislative history that demonstrates the importance Congress attached to the elements of the express causes of action.

In enacting § 18, Congress considered and rejected a cause of action based upon the effect upon market price of a report filed with the SEC, but the court of appeals here said that such an effect was sufficient for a § 10(b) claim (32a). The initial version of the provision which became § 18(a) required only that the plaintiff be a person "who shall have purchased or sold a security the price of which may have been affected by such statement." S. 2693, 73rd Cong., 2d Sess. § 17(a) (1934). That version was criticized in the hearings concerning the 1934 Act because it permitted recovery of damages by persons "who have not relied upon the inaccurate or misleading statement" and by those who

"trade recklessly" as well as "unscrupulous traders" who were not misled by the statements later alleged to be false.* Because of that criticism, the bill was redrafted and the requirement of actual reliance was added. As explained by Representative Sam Rayburn, then Chairman of the Committee on Interstate and Foreign Commerce:

> "The first provision of the bill as originally written was very much challenged on the ground that reliance should be required. This objection has been met." (78 Cong.Rec. at 7701 (1934))

The original version of § 18 also contained a provision barring any action not brought within two years after discovery of the facts constituting the cause of action and six years after the cause of action accrued. Senator Kean thought the two-year period "nothing but blackmail."

> "They discover it after the market has gone down, and after something has happened, and they are looking for mistakes. . . ." (*1934 Senate Hearings* at 6565)

The bill was revised to require that an action be brought within one year of discovery and three years of accrual of the cause of action. The Court has described this as a "significant" change, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 212 n.31 (1976), but such a description is altogether too modest as the chronology of this action demonstrates.

As part of the same act passed in 1934, Congress also amended the 1933 Act to reduce the limitations period for

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* *Stock Exchange Practices: Hearings on S.Res. 84, S.Res. 56 and S.Res. 97 Before Sen. Comm. on Banking and Currency*, 73d Cong. 2d Sess. at 6638, 7084 (1934) (*"1934 Senate Hearings"*); *Stock Exchange Regulation: Hearing on H.R. 7852 and 8720 Before House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. at 226, 656 (1934) (*"1934 House Hearing"*). *See also 1934 Senate Hearings* at 6939, 7186, 7567-68; *1934 House Hearing* at 262, 489.

actions under §§ 11 and 12 from two years from discovery and ten years from the purchase to one year and three years and to provide a limited reliance requirement in actions under § 11, *H.R. Conf. Rep. No. 1838,* 73d Cong., 2d Sess. 41-42 (1934).

"'Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.'" *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 21 (1979), referring to § 18 of the 1934 Act and § 11 of the 1933 Act and quoting *Touche Ross & Co.* v. *Redington,* 442 U.S. at 572.

The court of appeals here stressed that the express remedies enacted by Congress were "not available" to Wachovia Bank (34a). It ignored this Court's direction in *Touche Ross,* 442 U.S. at 579, that:

> "[W]e are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. '[I]t is not for us to fill any *hiatus* Congress has left in this area.'"

The court of appeals rejected the *expressio unius* canon of statutory construction as "a dangerous road map" (27a). It ignored this Court's teaching in *Transamerica Mortgage,* 444 U.S. at 19-20, that:

> "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' . . . See *Amtrak,* 414 U.S., at 458; *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412, 419; *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 471,"

and that the *expressio unius* canon may yield only "to persuasive evidence of a contrary legislative intent." *Accord,*

Kissinger v. *Reporters Committee*, 445 U.S. 136, 148-49 (1980):

> "The Records Act also expressly provides administrative remedies for violations of the duties it imposes, implicating our conclusion in *Transamerica Mortgage* that it is 'an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'"

The intent of Congress with respect to private damage remedies is evident from the terms of the 1933 Act and the 1934 Act and from their legislative history. A federal damage remedy against experts such as independent auditors is provided where a statement or opinion of such a person is one which Congress required to be filed with the SEC—in § 11 for misstatements in 1933 Act registration statements and in § 18 for misstatements in 1934 Act filings. The legislative history demonstrates that a private damage action "was not within the contemplation of the Congress that enacted § 10(b)," *Aaron* v. *SEC*, 446 U.S. at 691.*

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* Section 10(b) was intended, rather, to provide the *SEC* with authority to regulate new manipulative market devices not already expressly proscribed by other provisions of the 1934 Act, *Hochfelder*, 425 U.S. at 201-02. *See* 78 Cong. Rec. at 2271 (1934) (remarks of Sen. Fletcher).

An "implied" § 10(b) cause of action for an injured seller was first established in *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946), decided by Judge Kirkpatrick, on the basis of the common law statutory tort concept emphatically rejected by the Court in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 576-78. Judge Kirkpatrick also decided the first case to articulate the so-called "control group" test for determining the scope of the attorney-client privilege in the corporate context, *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (E.D. Pa.), *petition for mandamus and prohibition denied*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). Only three months ago the Court considered and rejected that test, *Upjohn Co.* v. *United States*, 101 S.Ct. 677, 683 (1981).

Post-enactment legislative history provides, as it did in *Transamerica Mortgage*, 444 U.S. at 23 n.13, "another clear indication that Congress knew how to confer a private right of action when it wished to do so." In 1956 a bill was proposed in Congress to amend the 1933 Act to provide a civil remedy against experts such as the independent auditor for purchasers of publicly offered shares exempt from the 1933 Act registration requirements under § 3(b) (the exemption for small public offerings). The House Committee on Interstate and Foreign Commerce recommended passage of the amendment on the ground that purchasers in transactions exempt from the registration requirement, like the Wachovia Bank purchase, may rely on "statements of officers and directors of the issuer, its underwriters, accountants, attorneys, engineers and other experts" and "there is no civil liability to any of the aforementioned individuals," *H.R. Rep. No. 2513*, 84th Cong., 2d Sess. at 5 (1956).

> "The only civil remedy the purchaser of a security, issued pursuant to section 3(b) exemption, has for false and misleading statements or omissions in [an] offering circular is to sue the seller of the security under section 12 [of the 1933 Act]. By contrast, the investor in registered securities has civil remedies under sections 11 and 12 . . . [and] can sue not only the seller of the security, but also the issuer, its officers and directors, the underwriters, the accountants, the attorneys." (*Ibid.*)

The SEC opposed the amendment since it would frustrate the purpose of the exemption from registration, and "criminal liability in the event that false statements were made" constituted a sufficient deterrent to non-sellers (*id.* at 32). The SEC recognized § 17 of the 1933 Act provides

only for criminal and injunctive remedies, that the § 11 cause of action for money damages was not applicable and that the § 12(2) cause of action for money damages was available only against sellers (*id.* at 31). It said "[t]he history of the statute makes it clear that this pattern of the statute was based on a policy decision of the Congress" concerning liability "in the exempted field" (*ibid.*). The bill was not enacted.

The court of appeals did not refer to the legislative history at the time of the enactment of the 1933 and 1934 Acts. Rather, it argued that the absence of express Congressional disapproval of "judicial implication" was a "significant" silence (36a), relying upon *Leist* v. *Simplot*, 638 F.2d 283 (2d Cir. 1980). This Court has granted certiorari to review that decision *sub nom. New York Mercantile Exchange* v. *Leist* (No. 80-757), 49 U.S.L.W. 3617 (U.S. February 23, 1981).

The court's acknowledgment that "judicial implication" is what is involved underlines the error it made. The Constitution prohibits "judicial implication" of private causes of action. Congressional silence does not validate the exercise by federal judges of Congress' legislative power.

As is evidenced by the decision below and by the decisions referred to earlier (*supra* p. 9), many lower courts are reluctant to follow the teaching of this Court's most recent decisions concerning the inference of a private remedy from a statute providing none. Unstated, but plainly underlying that reluctance, is the belief that the federal courts must provide a forum and a remedy for every grievance that has some relationship to federal legislation or regulation. Only this Court can recall the lower courts to their role under the Constitution.

2. *Retroactivity*—The decision of the court of appeals denying retroactive application to its ruling in *Forrestal Village* is in direct conflict with *Valencia* v. *Anderson Brothers Ford*, 617 F.2d 1278 (7th Cir.), *cert. granted* (No. 80-84), 49 U.S.L.W. 3350 (U.S. Nov. 10, 1980).

There, the Court of Appeals for the Seventh Circuit held:

> "All three of the factors listed in *Chevron Oil* must be shown to favor prospective-only application before a decision will be denied retroactive effect." (617 F.2d at 1289)

Here, referring to the second factor of *Chevron Oil*, the court below said:

> "The second factor is more equivocal. The court did base its decision in *Forrestal Village* on which statute of limitations period best furthered federal policy. But the choice was ultimately dictated by the 'commonality of purpose' between the blue sky law and sections 10(b) and 17(a), 551 F.2d at 414, not by any substantive difference between a two- and three-year limitation. Even if this second factor suggests retroactive application of *Forrestal Village*, we think it outweighed by the first and third criteria, which overwhelmingly dictate that the decision be applied prospectively here." (13a-14a) (footnote omitted)

Even as to the first and third *Chevron Oil* factors, the court's certitude is contradicted by its own *Forrestal Village* decision where, in applying the "blue sky" statute of limitations to bar the plaintiff, it had said the result was "obvious" (551 F.2d at 414). An obvious result can be neither unforeseeable nor inequitable.

In any case, the plaintiff in *Forrestal Village* was held to be time-barred by the two year "blue sky" statute. What

then was different about the situation of the Wachovia Bank plaintiffs who turned the matter over to counsel for litigation more than three years before they brought suit?

Unless the presence of all three *Chevron Oil* factors is required, the precedential value of any decision is uncertain. The decision below made of the rule of *Chevron Oil* not a rule, but the present-day equivalent of the length of the chancellor's foot.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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April 1981

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1595

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL., APPELLANTS

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.

No. 79-1596

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL., APPELLANTS

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.

No. 79-1597

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL.

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.
WHITE & CASE, ET AL., APPELLANTS

Opinion of United States Court of Appeals

No. 79-1598

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL.

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.
PEAT, MARWICK, ET AL., APPELLANTS

No. 79-1599

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL.

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.
ROGER O. WALTHER, APPELLANT

No. 79-1600

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL.

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.
JAMES F. JOY, APPELLANT

Opinion of United States Court of Appeals

No. 79-1601

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL.

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.
DONALD A. FERGUSSON AND ROBERT A. FERGUSSON,
APPELLANTS

No. 79-1602

WACHOVIA BANK AND TRUST CO., N.A.
(as Trustee and Agent for various
trust accounts), ET AL.

v.

NATIONAL STUDENT MARKETING CORPORATION, ET AL.
CORTES W. RANDELL, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 166-73)

Argued December 13, 1979

JUDGMENT ENTERED THIS DATE
Decided December 5, 1980

Juan A. del Real and *Gilbert C. Miller,* with whom *Richard M. Phillips* was on the brief, for appellants in No. 79-1595.

Paul Gonson, Principal Associate General Counsel, Securities and Exchange Commission, with whom *Michael K. Wolensky,* Assistant General Counsel, Securities and Exchange Commission, was on the brief, for amicus curiae, Securities and Exchange Commission, in No. 79-1595 urging reversal.

Milton V. Freeman, with whom *Daniel A. Rezneck, Thomas D. Nurmi,* and *Lawrence A. Schneider* were on the brief, for White & Case and Marion Jay Epley, III, appellees in No. 79-1595 and cross-appellants in No. 79-1597.

William E. Hegarty, with whom *Mathias E. Mone* was on the brief, for Peat, Marwick, Mitchell & Co., et al. appellees in Nos. 79-1595 and 79-1596 and cross-appellants in No. 79-1598.

Franklin M. Schultz and *Bruce W. Dunne* were on the brief for James F. Joy, appellee in Nos. 79-1595, 79-1596, 79-1597, 79-1598, 79-1599, 79-1601, and 79-1602 and cross-appellant in No. 79-1600.

Sidney Dickstein was on the brief for Roger O. Walther, appellee in Nos. 79-1595, 79-1596, 79-1597, 79-1598, 79-1600, 79-1601, and 79-1602 and cross-appellant in No. 79-1599.

William R. Bernard was on the brief for Cortes W. Randell, appellee in Nos. 79-1595, 79-1596, 79-1597, 79-1598, 79-1599, 79-1600, and 79-1601 and cross-appellant in No. 79-1602.

George P. Michaely, Jr., and *Thomas W. Armstrong* were on the brief for Fergusson, et al., appellees in No. 79-1595 and cross-appellants in No. 79-1601.

Also *Cherif Sedky* entered an appearance for appellants Wachovia Bank and Trust Co., et al. in Nos. 79-1595 and 79-1596.

Opinion of United States Court of Appeals

Before: ROBINSON and MIKVA, *Circuit Judges*, and FLANNERY*, *United States District Judge* for the District of Columbia.

Opinion for the court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: This is yet another installment in the saga of the collapse of one of the glamor stocks of the 1960s, the National Student Marketing Corporation (NSMC). Appellants allege a widespread scheme to misrepresent the financial condition of NSMC and thereby to stimulate investor interest in NSMC's securities. They seek damages to remedy losses suffered when the value of NSMC stock dropped suddenly and dramatically more than a decade ago, and they appeal the district court's dismissal of their claim as time-barred. On cross-appeal, defendants argue that the court below erred in finding that appellants have a private right of action under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act), 15 U.S.C. § 78j(b) (1976), and under section 17(a) of the Securities Act of 1933 (the 1933 Act), 15 U.S.C. § 77q(a) (1976).

We reverse the district court's holding that appellants' claims are barred by the statute of limitations, and we affirm appellants' right to pursue a remedy under section 10(b) of the 1934 Act.

I. BACKGROUND

In December of 1979, appellants (Wachovia)[1] bought approximately five million dollars' worth of NSMC stock

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* Sitting by designation pursuant to 28 U.S.C. § 292(a). Judge Flannery authored section II of this opinion.

[1] Appellants are the Wachovia Bank and Trust Co., the Mellon Bank, the First Wisconsin Trust Co., the Dreyfus Offshore Trust, and the National Fire Insurance Company of Hartford.

from the corporation and two of its directors. The purchase was a private placement transaction governed by detailed purchase agreements. Two months later, the market price of NSMC stock declined more than sixty percent, and NSMC announced that it expected to report a loss for the previous fiscal quarter.

The Securities and Exchange Commission (SEC) then began a two-year investigation of NSMC, which ended in February, 1972, with the filing of an enforcement and injunction action against NSMC and the other major participants in NSMC's merger with Interstate National Corporation.[2] The Commission charged that the price of NSMC stock had been artificially inflated in violation of the securities laws. In addition, various civil actions were filed in 1970 and 1972 by purchasers of NSMC stock.[3]

The original complaint in this case, filed January 29, 1973, sought damages from NSMC and several of its officers and employees and from Peat, Marwick, Mitchell & Co. (PMM), NSMC's independent auditor; Anthony Natelli, the PMM partner in charge of the NSMC account; and Joseph Scansaroli, the PMM audit supervisor. These defendants were charged with participating in a conspiracy to defraud investors by artificially inflating the price of NSMC stock and thereby violating various sections of the 1933 and 1934 Acts. Specifically, appellants contended that

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[2] *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978).

[3] *Natale v. National Student Marketing Corp.*, Civ. No. 72-721 (S.D.N.Y., filed Feb. 18, 1972); *Lipsig v. National Student Marketing Corp.*, Civ. No. 70-2006 (S.D.N.Y., filed May 15, 1970); *Stuckey v. National Student Marketing Corp.*, Civ. No. 70-H-251 (S.D. Tex., filed March 19, 1970); *Garber v. Randell*, Civ. No. 70-835 (S.D.N.Y., filed March 2, 1970).

misrepresentations about NSMC's financial condition had been included in oral statements, in press releases, in reports filed with the SEC, and in other published reports not filed with the Commission. The fraudulent scheme was allegedly furthered by NSMC's acquisition of a number of corporations.

The original complaint did not name as defendants White & Case, NSMC's outside counsel, or Jay Epley, the White & Case partner principally in charge of the NSMC account. As NSMC's counsel, they had drafted a purchase agreement between appellants and NSMC and had issued a legal opinion to appellants, in which the buyers were assured that the contemplated transaction would not violate any statute. Two days before the complaint was filed, appellants had entered into a letter agreement with White & Case and Epley, which provided that the statute of limitations would be tolled as to them for two years from the date of the letter. Appellants then amended their complaint on May 28, 1975, to include White & Case and Epley as defendants.

The defendants[4] moved to dismiss the complaint on two grounds: that the action was time-barred under the two-year statute of limitations of the District of Columbia's blue sky law, and that the sections of the securities acts on which the claims were based did not provide for or allow a private right of action. The district court held that a private remedy was implied under section 10(b) of the 1934

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[4] Appellants settled with NSMC and various named defendants, and all claims against those parties were dismissed. Defendants below, and appellees here, are PMM and Natelli and Scansaroli; White & Case and Epley; and the following NSMC officers and directors: John G. Davies, James F. Joy, Dennis M. Kelly, Bernard J. Kurek, Cortes W. Randell, and Roger O. Walther.

Act and under section 17(a) of the 1933 Act, but the court dismissed the action as untimely.[5] Both issues are now before this court.[6]

II. Statute of Limitations

Two statute of limitations questions must be resolved: (1) whether the district court committed error in applying retrospectively *Forrestal Village, Inc. v. Graham,* 551 F.2d 411 (D.C. Cir. 1977), which calls for a two-year statute of limitations in Rule 10b-5 actions; and (2) whether the district court properly declined application of the equitable tolling principle.[7]

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[5] The district court's opinion is reported at 461 F. Supp. 999 (D.D.C. 1978).

[6] Appellants abandoned their claim under § 13(a) of the 1934 Act, 15 U.S.C. § 78m(a) (1976). Their claim under § 14(a) of that Act, 15 U.S.C. § 78n(a) (1976), was dismissed by the court below, and appellants do not appeal from that decision. In addition, defendants-appellees John J. Davies, Dennis M. Kelly, and Bernard J. Kurek have not joined the cross-appeal.

[7] A third issue—whether appellants may take advantage of class action tolling—warrants only brief comment. In *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974), the Supreme Court held that commencement of a class action tolls the running of the statute of limitations "for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553. Hence, a member of the purported class, after denial of certification, may intervene in an individual suit without penalty for the time period during which the class certification issue is pending.

The district court correctly ruled that appellants fail to qualify for the *American Pipe* tolling rule. Here, certification of the class was granted, not denied. Moreover, no intervention was ever attempted; appellants filed their own action nine months before the district court granted certification, and preferred to pursue their own case rather than seek class relief.

A. *The Applicable Statute of Limitations*

For causes of action implied under the securities laws, the forum state's statute of limitations rules. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976). At issue here is which limitations period to apply: the three-year general fraud provision, D.C. Code § 12-301(8) (1973), or the two-year blue sky law provision, *id.* § 2-2413(e).

Resolution of this issue determines whether this suit should be dismissed on statute of limitations grounds. Appellants bought NSMC stock on December 17, 1969. The statute of limitations began to run at the end of February, 1970,[8] and the suit was filed in January, 1973—more than two years, but less than three years, after the limitations period had begun to run. The district court found the two-year period applicable and accordingly dismissed the case for untimely filing.

The question of the appropriate statute of limitations is an equivocal one because the trend in the federal case law has shifted. Federal courts once favored invocation of the general fraud limitations period for Rule 10b-5 actions. But during the last decade, the law has moved toward application of the blue sky law limitations period.

The case law in this circuit reflects that general trend. Before 1977, this court favored application of the three-year general fraud limitations period. But in *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977), we decided that the two-year blue sky law provision, rather than the three-year general fraud limitations guideline, " 'best effectuates the federal policy involved.' " *Id.* at

[8] We arrive at this date by invoking the doctrine of equitable tolling. *See* section II(B) *infra*.

413.[9] In so ruling, this circuit joined the majority of circuits, which at that time—in 1977—applied local blue sky law limitations periods to section 10(b) and section 17(a) securities actions.

Whether the instant case should be governed by a three-year or two-year statute of limitations thus turns on whether the *Forrestal Village* decision is applied prospectively or retrospectively. The critical precedent on this question is *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). We therefore look to that opinion for guidance.

In *Chevron,* the plaintiff, who was injured while working on a drilling rig located on the Outer Continental Shelf, filed suit more than two years after the date the injury occurred. The defendant originally declined to raise the issue of the limitations period. The parties correctly assumed, based on federal court precedent, that admiralty law—including the doctrine of laches—applied to the case.[10] During discovery, however, the Supreme Court released its decision in *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), which removed the applicability of admiralty law to cases like *Chevron.* Based on *Rodrigue,* the district court in *Chevron* applied the local one-year limitations period for personal injury suits and, accordingly, dismissed the case. *See* 404 U.S. at 98-99.

Articulating three criteria, the Supreme Court ruled in *Chevron* that its *Rodrigue* decision should be given prospective effect. The first, and most fundamental, factor is that "the decision to be applied nonretroactively must es-

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[9] *Forrestal Village* noted that the blue sky statute, because it deals with the sale of securities, more closely resembles Rule 10b-5 than does common law fraud. *See* 551 F.2d at 414.

[10] The plaintiff alleged that, only many months after the accident occurred, did he realize the serious nature of the injury.

tablish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 1006 (citation omitted). Second, the court must consider whether retrospective application will further or hinder the purpose of the decision in question. Finally, prospectivity is required if retroactive application will create substantial injustice.

In applying the first criterion and deciding whether a current decision overrules precedent, does the court look to the law as it appears at the time of the new decision, or to the time when a claim arose and a plaintiff relied on the law? The state of the law may fluctuate between these two dates, thereby changing the outcome of the first inquiry required by *Chevron*. The distinction is critical here.

The court below applied *Forrestal Village* retroactively. It ruled that that case failed to overrule precedent, as it existed when the decision was released in 1977. It is correct that, in 1977, the circuits favored application of the blue sky law limitations period. *Chevron*, however, does not seek to compare a new decision to the extant law when that decision was published. Rather, *Chevron* favors comparing the decision to the law at the time the plaintiff relied upon it, that is, the law after the claim arose and during the running of the limitations period.

This choice is clear in the opinion itself. The very language of the first criterion set out in *Chevron* requires nonretroactive application of a decision that overrules law "on which litigants may have relied." Moreover, the Court repeatedly noted that its *Rodrigue* decision reversed the law that the plaintiff relied upon when he contemplated filing suit. For example, the Court observed that, from the time the plaintiff was injured until he commenced suit, the

federal cases supported application of admiralty law to cases such as plaintiff's: "[i]t cannot be assumed that he [plaintiff] did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was rely on the law as it then was." *Id.* at 107. In reciting the facts, the Court remarked, "[w]hen this law suit was initiated, there was a line of federal court decisions" favoring application of admiralty law, and the doctrine of laches, to the case. *Id.* at 99. The court further noted that the plaintiff's injuries occurred three years before *Rodrigue* was released, and that the plaintiff filed his law suit more than one year before that decision.

The lesson is clear. *Chevron* mandates nonretroactive application of a statute of limitations decision that overrules the weight of past precedent. In deciding whether this criterion is met, a court must compare the new limitations ruling with the law the plaintiff relied upon when he contemplated filing suit. The court below thus erred in looking at the state of the law in 1977 when *Forrestal Village* was decided.

Appellants relied on the law from December, 1969, when they bought NSMC stock, until January, 1973, when they filed suit. During that period, this circuit favored application of the general fraud limitations period. In fact, courts in this circuit reaffirmed the three-year fraud period as late as 1975. *See, e.g., Vance v. National Realty Trust,* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,004 (D.C. Cir. 1975); *National Realty Trust v. Neelon Management Co.,* [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,049 (D.D.C. 1973); *Conlon v. University Computing Co.,* [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,796 (D.D.C. 1973).

Moreover, as of December, 1971—when the two-year limitations deadline applied by the district court expired—only one circuit court and one federal district court had applied the blue sky law limitations period to federal securities actions. *See Vanderboon v. Sexton,* 422 F.2d 1233 (8th Cir. 1970); *Batchelor v. Legg & Co.,* 52 F.R.D. 533 (D. Md. 1971). On the other hand, forty-six federal court decisions had applied the forum state's general fraud statute of limitations.[11] These cases included opinions from eight United States Circuit Courts of Appeals.[12]

Thus, prior to, and during, the running of the limitations period, federal courts, including this circuit, overwhelmingly adopted the general fraud limitations period. It was the law at this point in time on which appellants relied. Accordingly, consideration of the first factor of *Chevron* points toward prospective application of *Forrestal Village.*

For the same reason, the third criterion also favors prospectivity. As in *Chevron,* "[i]t would also produce the most 'substantial inequitable results' to hold that [appellants] 'slept on [their] rights' at a time when [they] could not have known the time limitation that the law imposed upon [them]." 404 U.S. at 108 (citation omitted).

The second factor is more equivocal. The court did base its decision in *Forrestal Village* on which statute of limita-

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[11] *See* Brief for Appellants at 34 n.22.

[12] *E.g., Richardson v. MacArthur,* 451 F.2d 35 (10th Cir. 1971); *Bailes v. Colonial Press, Inc.,* 444 F.2d 1241 (5th Cir. 1971); *Douglass v. Glenn E. Inton Investments, Inc.,* 440 F.2d 912 (9th Cir. 1971); *Klein* v. *Auchincloss, Parker & Redpath,* 436 F.2d 339 (2d Cir. 1971); *Morgan v. Koch,* 419 F.2d 993 (7th Cir. 1969); *Charney v. Thomas,* 372 F.2d 97 (6th Cir. 1967); *Janigan v. Taylor,* 344 F.2d 781 (1st Cir.), *cert. denied,* 382 U.S. 879 (1965); *Stevens v. Abbott, Proctor & Paine,* 288 F. Supp. 836 (E.D. Va. 1968); *Tobacco & Allied Stocks v. Transamerica Corp.,* 143 F. Supp. 323 (D. Del. 1956).

tions period best furthered federal policy. But the choice was ultimately dictated by the "commonality of purpose" between the blue sky law and sections 10(b) and 17(a), 551 F.2d at 414, not by any substantive difference between a two- and three-year limitation. Even if this second factor suggests retroactive application of *Forrestal Village,* we think it outweighed by the first and third criteria, which overwhelmingly dictate that the decision be applied prospectively here.[13] This action is therefore guided by the three-year statute of limitations for general fraud.

B. *Equitable Tolling*

The doctrine of equitable tolling permits, with respect to fraud, the tolling of the limitations period until the plaintiff discovers, or should have discovered through the exercise of due diligence, the fraudulent activity. This court recently articulated the equitable tolling standard in *Fitzgerald v. Seamans,* 553 F.2d 220, 228 (D.C. Cir. 1977): "time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of

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[13] Appellees' citation to *Zweibon v. Mitchell,* 606 F.2d 1172, 1177 (D.C. Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (Nos. 79-881 & 79-883), for the proposition that "[r]etroactivity is the rule" is unavailing. In *Zweibon,* the judicial ruling at issue—requiring a warrant for domestic national security wiretaps—did not overrule precedent. Nor was the ruling unforeshadowed. On several occasions in the late 1960s, the Supreme Court had expressed concern regarding warrantless wiretaps, and "[e]xtension of that concern to the national security sphere was certainly likely, though perhaps not inevitable." *Id.* at 1178 n.31. Hence, rather than adopt an avulsive change in the law, or resolve a complex issue of first impression, *Zweibon* merely extended existing law to domestic national security situations. However, where, as here, a decision displaces the weight of precedent relied upon by the plaintiff, prospective, rather than retrospective, application must be the rule.

the lawsuit." The *Fitzgerald* formulation of the equitable tolling doctrine reiterated a standard long applied in federal courts. *See, e.g., Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975); *Klein v. Bower*, 421 F.2d 338, 343 (D.C. Cir. 1970).

The district court decided against invocation of the equitable tolling principle. It ruled that appellants "should have known of the fraud within the two-year statute of limitations, running immediately after the sale." 461 F. Supp. at 1010. The court based its ruling on certain " 'code blue' notices of fraud." *Id.* at 1009. These included the precipitous decline of the price of NSMC stock between December 17, 1969, and February 17, 1970; NSMC's reported loss on February 16, 1970, of 1.2 to 1.7 million dollars; and articles in *Barron's* (December 22, 1969)[14] and *The Wall Street Journal* (February 17, 1970),[15] questioning NSMC's auditing procedures and reporting the company's financial problems. The court below thus concluded:

> [T]hese facts, coupled with the several lawsuits filed in 1970, provided a clearly marked trail, which, if pursued with diligence, would have led the plaintiffs to the fraud of the NSMC officials and to the attorney-defendants and their involvement in the stock sale.

Id.

There can be little doubt that these code blue factors implicated the accountant-defendants—but only in February, 1970, when most of the events occurred. The only hint of fraud available to appellants before February, 1970, was

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[14] Joint Appendix (J.A.) at 710.

[15] J.A. at 712.

the publication of the *Barron's* article, which appeared on December 22, 1969. This article criticized NSMC's practices of deferring costs, and of including as part of its 1969 income the earnings of companies acquired after expiration of the 1969 fiscal year.

This article, taken alone, was insufficient to alert appellants to fraudulent activity committed by the accountant-defendants. Although the article questions the nature of certain accounting procedures, it in no way intimates that such procedures were fraudulent. As a matter of law, we believe that one article challenging the accounting procedures of a reputable firm is insufficient to impute knowledge of fraud to appellants. *See Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979) (publicly disseminated information doubting propriety of accounting practices inconclusive regarding time that plaintiff possessed knowledge of fraud). Hence, although we agree with the court below that the code blue factors, taken cumulatively, were sufficient to warn appellants of the possibility of fraud on the part of the accountant-defendants, we nonetheless find that the court committed error in declining to toll the limitations period until February, 1970. The statute of limitations cannot run until the events that implicated the accountants occurred, and all but one of them occurred, or became discernible, in February, 1970. The statute of limitations against the accountants should thus be tolled until that time. Given our holding above that the three-year statute of limitations applies to this case, appellants filed this suit against the auditor-defendants within the limitations period.

We are unsure whether the code blue factors were sufficient to place appellants on notice in February, 1970, of the possibility of fraud committed by the attorney-defen-

dants. But a more precise determination on the running of the limitations period against these defendants is unnecessary. Insofar as the three-year statute of limitations applies, and February, 1970, is the earliest possible time the attorney-defendants could have been implicated, appellants' claims against these defendants clearly fall within the limitations deadline. We therefore reverse the ruling of the court below and find that appellants' claims are not time-barred.

III. Availability of Implied Remedies

The second issue in this case resurrects a decade-old and multi-faceted controversy and requires application of a doctrine that was examined by the Supreme Court no less than five times during the last Term. The question before the court on the cross-appeal, and necessary to our decision in light of our holding on the statute of limitations question, is whether an implied right of action is available to Wachovia under section 10(b) of the 1934 Act[16] and the corresponding SEC Rule 10b-5,[17] as well as under section

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[16] It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 10(b), 15 U.S.C. § 78j(b) (1976).

[17] Rule 10b-5, promulgated by the SEC pursuant to authority granted by § 10(b) of the 1934 Act, provides in full:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate com-

17(a) of the 1933 Act,[18] or whether plaintiffs are limited to the express remedies set forth in those statutes.[19]

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merce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1979).

[18] It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 17(a), 15 U.S.C. § 77q(a) (1976).

[19] Because we decide that appellants may pursue a private remedy under § 10(b) of the 1934 Act, and because their claims can be fully satisfied by such an action, we do not decide whether a private right of action may be implied under § 17(a) of the 1933 Act. That question has explicitly been left open by the Supreme Court. *See Aaron v. SEC*, 100 S. Ct. 1945, 1951 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 n.6 (1975). The courts of appeals are in conflict on this issue, though most have recognized a cause of action implicit in § 17(a). *Compare Kirshner v. United States*, 603 F.2d 234, 241 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979) (recognizing implied remedy under § 17(a)); *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1245-46 (7th Cir.

A. *Implying a Cause of Action Under Section 10(b) and Rule 10b-5*

It has been almost thirty-five years since a private cause of action was first implied under section 10(b) and Rule 10b-5, and "a substantial body of case law and commentary has developed as to its elements." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976). Although the initial formulation of the implied remedy and the molding of its contours occurred in the courts of appeals,[20] the Supreme Court has recognized an implied cause of action under 10(b) many times.[21]

Moreover, despite many efforts, successful and unsuccessful, to amend related sections of the national securities laws, Congress never saw reason to limit or constrict the application of implied remedies under section 10(b). Long-

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1977), *rev'd on other grounds,* 439 U.S. 551 (1979) (same); *Newman v. Prior,* 518 F.2d 97, 99 (4th Cir. 1975) (same), *with Shull v. Dain, Kaiman & Quail, Inc.,* 561 F.2d 152, 159 (8th Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978) (rejecting implied remedy).

[20] *See, e.g., Matheson v. Armbrust,* 284 F.2d 670 (9th Cir. 1960); *Hooper v. Mountain States Securities Corp.,* 282 F.2d 195 (5th Cir. 1960), *cert. denied,* 365 U.S. 814 (1961); *Fratt v. Robinson,* 203 F.2d 627 (9th Cir. 1953); *Fischman v. Raytheon Mfg. Co.,* 188 F.2d 783 (2d Cir. 1951).

[21] *See Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 477 (1977); *Piper v. Chris-Craft Indus., Inc.,* 430 U.S. 1, 25 (1977) ("This Court has nonetheless held that in some circumstances a private cause of action can be implied with respect to the 1934 Act's anti-fraud provisions, even though the relevant provisions are silent as to remedies."); *Hochfelder,* 425 U.S. at 196 ("[T]he existence of a private cause of action for violations of the statute and the Rule is now well-established."); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975); *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 144-54 (1972); *Superintendent of Ins. v. Bankers Life & Casualty Co.,* 404 U.S. 6, 13 n.9 (1971) ("It is now well established that a private right of action is implied under § 10(b).").

standing judicial application of a court's statutory interpretation, the Supreme Court has said, when added to the failure of Congress to reject its reasoning, "argues significantly in favor of [its] acceptance." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 733 (1975).

The starting point for any inquiry regarding implied remedies is the intent of Congress in passing the statute in the first place. The Supreme Court's recent opinions, emphasizing that congressional intent must be the touchstone, have reaffirmed use of the test first articulated in *Cort v. Ash,* 422 U.S. 66 (1975), for ascertaining that intent.[22] There the Court outlined the following four-step analysis to guide efforts to determine legislative intent:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original).

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[22] Although one of the dissenters in *Cannon v. University of Chicago* would have discarded the *Cort* approach, *see* 441 U.S. 677, 742 (1979) (Powell, J., dissenting), the controversy has primarily revolved around how to apply *Cort,* not whether to apply it. *See Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 23-24 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560, 575-76 (1979); *Cannon,* 441 U.S. at 688.

Applying the *Cort* criteria, it is clear firstly that Wachovia is within the specific class to be protected by the statute. Section 10(b) proclaims as its purpose "the protection of investors." Secondly, as in other cases in which private remedies have been implied, a search of the legislative history yields little specific. Congress did not spend much time discussing 10(b), notwithstanding its clear place as a " 'catch-all clause to prevent manipulative devices.' " *Hochfelder,* 425 U.S. at 202 (quoting Thomas Corcoran, spokesperson for the drafters of the statute); *see Chiarella v. United States,* 445 U.S. 222, 226 (1980).

Such silence, however, is neither surprising nor determinative. *See Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 18 (1979); *Cannon v. University of Chicago,* 441 U.S. 677, 694 (1979); *Blue Chip Stamps,* 421 U.S. at 737. If Congress had spoken plainly enough, the task would be simple. The quest, therefore, is not necessarily for evidence that Congress specifically intended to imply a private right of action, but rather for indications whether Congress meant to deny such a remedy. This was the thrust of *Transamerica.* There, the Court found legislative maneuverings that so reshaped earlier drafts of the statute at issue as to offer persuasive evidence that Congress wanted no implied remedies added to what the statute specifically provided.[23] No such legislative history disposes of the issue here.

Because the relevant legislative chronicles do not negative the existence of implied remedies, the third factor of *Cort* must be examined: whether a private remedy "is necessary or at least helpful to the accomplishment of the statutory purpose." *Cannon,* 441 U.S. at 703. We find more than the requisite link between the existence of an

[23] *See* text following note 26 *infra.*

implied cause of action and the broad purposes of the 1934 Act. A private right of action not only compensates the investors who are the beneficiaries of section 10(b) in general, but also affords a broad deterrent force against the fraud that the statute condemns. *See, e.g., Fratt v. Robinson,* 203 F.2d 627, 631 (9th Cir. 1953). And, as the SEC argues forcefully in its amicus position, a private remedy is a necessary supplement to administrative enforcement because the Commission cannot do the job alone. *See Blue Chip Stamps,* 421 U.S. at 730; *J.I. Case Co. v. Borak,* 377 U.S. 426, 432-33 (1964); *cf. Cannon,* 441 U.S. at 708 n.42.[24]

Application of the *Cort* criteria thus points in favor of appellants' right to pursue a cause of action here. Cross-appellants urge, however, that recent opinions of the Supreme Court have limited preexisting law in this are. We cannot read those cases to support a conclusion that a private remedy under section 10(b) no longer exists.

In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), the Court held that there was a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976), even though the statute itself specified no such cause of action. Among the two opinions recognizing an implied remedy and the two opinions in dissent, there was indeed reconciliation and reconsideration of earlier precedents. But the Court reiterated its

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[24] The fourth factor outlined in *Cort*—whether the case involves matters traditionally of state or federal concern—is not as relevant as the first three in any inquiry into congressional intent. Nevertheless, that criterion is clearly satisfied here. As the court below found, appellants' complaint alleges a broad scheme to manipulate the national market for NSMC stock. Conduct with such national implications is exactly what Congress was interested in controlling when it provided for federal regulation of the securities markets in the 1934 Act. *See* § 2, 15 U.S.C. § 78b (1976).

adherence to earlier guidelines, in particular, the four-part test of *Cort v. Ash.* In fact, that was the core of the complaint voiced by Justice Powell in dissent, who advocated abandonment of the *Cort* approach. *See* 441 U.S. at 749.[25]

The second case cited as proof of this radical shift away from implied remedies is *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979). There the Court did reject urgings for an implied remedy for violations of section 17(a) of the Securities Act of 1934, 15 U.S.C. § 78q(a) (1976). The Court pointed out how frequently it was called upon to "decide whether a private remedy is implicit in a statute not expressly providing one." *Id.* at 562. But the Court did not announce that it was going out of the business.[26]

Most recently, in *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979), the Court refused to imply a cause of action under section 206 of the Investors Advisers Act of 1940, 15 U.S.C. § 80b-5 (1976), a statutory provision worded very similarly to Rule 10b-5. The Court relied there on two pieces of evidence weighing against implication of a private remedy. First, the Act nowhere provided for damage remedies, from which the Court inferred that Congress had been unwilling to impose any monetary liability in private suits under the Act. The 1933 and 1934 Acts do, of course, provide express damage remedies, and the Court in *Transamerica* specifically distinguished them.

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[25] Even Justice Powell did not suggest that no private remedy should be implied under § 10(b); rather, he argued that implication of a cause of action under that section "reflects the unique history of Rule 10b-5" and does not "articulate any standards of general applicability." 441 U.S. at 738 (Powell, J., dissenting).

[26] For the Court in *Redington,* "the inquiry end[ed]" when (1) § 17(a) neither prohibited conduct nor granted private rights, but merely required that certain forms be filed, and (2) the legislative history was silent. 442 U.S. at 576. Here, of course, § 10(b) does specifically prohibit certain conduct.

See 444 U.S. at 20-21. Second, although early drafts of the Investors Advisers Act had given federal courts jurisdiction over "all suits in equity *and actions at law* brought to enforce any *liability or* duty" created by the statute, the final version appeared without the italicized phrases. The Court interpreted this omission as corroborating Congress' rejection of any civil liability. *See id.* at 21-22. In contrast, the 1934 Act's jurisdictional provision, 15 U.S.C. § 78aa (1976), is identical to the early version of the Investors Advisers Act quoted above.[27]

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[27] In addition to those cases discussed above, the Supreme Court has recently failed to imply private rights of action in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977). Both are distinguishable from this case. In *Brown*, involving the Trade Secrets Act, 18 U.S.C. § 1905 (1976), the Court expressed reluctance to find an implied remedy in a criminal statute. And, "[m]ost importantly," the Court noted, a private right was not necessary to effectuate the purposes of the Act in that case because of the availability of review under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976). 441 U.S. at 317-18.

In *Piper*, the Court rejected the contention of defeated tender offerors that they were entitled to a private remedy under § 14(e) of the 1934 Act, 15 U.S.C. § 78n(e) (1976), added by the Williams Act of 1968. The Court's decision was based on legislative history indicating that the sole purpose of the Williams Act was the protection of shareholders of target corporations. *See* 430 U.S. at 26-35. Moreover, the Court held, an implied remedy in favor of tender offerors might be inconsistent with that objective by awarding damages "to the very party whose activities Congress intended to curb." *Id.* at 39. Even if such damage awards might contribute indirectly to shareholder protection, the Court concluded that that objective could more directly be realized by "other, less drastic means more closely tailored to the precise congressional goal underlying the Williams Act." *Id.* at 40.

As made clear in our discussion accompanying notes 22-24 *supra*, the need for private remedies to supplement SEC enforcement of the 1934 Act and the absence of legislative history indicating congressional disapproval of such remedies distinguish the case before us and § 10(b) from the statutory provisions at issue in *Brown* and *Piper*.

It may be reasonable to infer from these recent pronouncements that the Court is not favorably inclined toward expanding the doctrine of implied remedies; it is unreasonable to imply, as cross-appellants seem to in their briefs, that all the implied remedies that have previously been established have now been swept away. In sum, we find that under the *Cort* analysis, section 10(b) continues to lend itself to private remedies, and that neither the spirit nor the letter of any Supreme Court opinion suggests otherwise.

B. *Application of Section 10(b) to Newly Issued Securities*

Cross-appellants argue that the entire 1934 Act, of which section 10(b) is a part, is inapplicable to this case because the Act was intended to regulate securities only after distribution. It is the 1933 Act, say cross-appellants, which was meant to cover newly issued securities. Such a rigidly compartmentalized analysis misses the clear intention of Congress and the overall purposes of the statutory scheme. Section 10(b) by its very terms applies to "any security," whether or not registered on a national exchange. The language was intended to be sweeping, and it has been so held. *See Affiliated Ute Citizens v. United States,* 406 U.S. 128, 151 (1972). In *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 195 (1963), the Court declared that Congress wanted securities legislation aimed at protecting against fraud to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes."

Cross-appellants advance the legislative history of the 1934 Act as supportive of their interpretation. Even if the language of section 10(b) were not so plain, its legislative history would offer cross-appellants little solace. That his-

tory corroborates Congress' intent, as noted above, that 10(b) act as a "catch-all clause to prevent manipulative devices." In fact, earlier drafts of the section limited its applicability to securities listed on a national exchange, but that restriction was removed in conference. *See* 1 A. BROMBERG, SECURITIES LAW: FRAUD § 2.2(320) (1977).

The broad scope of section 10(b) has been widely recognized, and the section has been applied to newly issued securities and to those sold in private placements. *See, e.g., Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971) ("[W]e read § 10(b) to mean that Congress meant to bar deceptive devices and contrivances in the purchase or sale of securities whether conducted in the original markets or face to face."); *Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 606-07 (5th Cir. 1975), *vacated on other grounds*, 426 U.S. 944 (1976), *on remand*, 546 F.2d 1252 (5th Cir.), *cert. denied*, 434 U.S. 831 (1977); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1336 (2d Cir. 1972); *Lawrence v. SEC*, 398 F.2d 276, 280 (1st Cir. 1968); *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195, 201 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); *Fratt v. Robinson*, 203 F.2d 627, 629-31 (9th Cir. 1953).

Moreover, overlap between the two statutes is neither "unusual nor unfortunate." *SEC v. National Securities, Inc.*, 393 U.S. 453, 468 (1969), *quoted in United States v. Naftalin*, 441 U.S. 768, 778 (1979). It is nowhere written that each pronouncement of Congress must be mutually exclusive of every other pronouncement. In the securities field, Congress has dealt with the problems of regulations many times—on both the cosmic and the specific levels. The 1933 and 1934 Acts are meant to be interrelated and interdependent components of a general scheme, and the

two should be read together. *See Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 206 (1976). There is no conflict between them, and their overlap in no way diminishes the plain meaning of section 10(b).

C. *The Relevance of Express Remedies*

Cross-appellants' final contention is that section 10(b) may not give rise to an implied remedy because other specific sections of the 1933 and 1934 Acts provide pertinent express remedies. The argument smacks somewhat of a "Catch 22" arrangement because in each instance cross-appellants are at the ready to show that the express remedies are not really available to Wachovia. And the argument has been unavailing in previous cases for reasons that are applicable here.

The ancient maxim *"expressio unius est exclusio alterius"* is a dangerous road map with which to explore legislative intent. As we have pointed out above, the nature of the legislative process militates against each enactment's being self-contained and mutually exclusive of every other enactment. Even in the context of a single piece of legislation, the existence of an express remedy arising under one section does not preclude the need for an implied remedy in other situations under other sections of the act. Such rigid analysis, noted the Supreme Court, would be an "excursion into extrapolation of legislative intent [that is] entirely unilluminating." *Cort v. Ash,* 422 U.S. 66, 83 n.14 (1975).

It is true that the Supreme Court has expressed concern about implying private rights of action when express remedies have been created by statute, but that concern has been limited to cases in which the express remedies would be nullified if additional remedies were implied. *See*

Touche Ross & Co. v. Redington, 442 U.S. 560, 574 (1979); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208-11 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975).[28] Such circumvention can hardly be an issue here, where the express remedies are totally different from the remedy implied under section 10(b), and where the express remedies are meant to treat different problems and to be applied in different situations.[29]

Section 11 of the 1933 Act,[30] for example, imposes civil liability for filing a false registration statement. Under

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[28] *Cf. Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 790 (8th Cir. 1967); *McFarland v. Memorex Corp.*, 493 F. Supp. 631, 653 (N.D. Cal. 1980); *Gunter v. Hutcheson*, 433 F. Supp. 42, 46-47 (N.D. Ga. 1977); *Dorfman v. First Boston Corp.*, 336 F. Supp. 1089, 1093-96 (E.D. Pa. 1972) (all holding that implied remedy under § 17(a) of the 1933 Act would circumvent limitations on express remedies provided by § 11 and § 12(2) of that Act).

[29] The Supreme Court has never decided whether the existence of express remedies precludes implication of a private right of action, and it specifically left the issue open in *Hochfelder*, 425 U.S. at 211 n.31, and in *Blue Chip Stamps*, 421 U.S. at 752 n.15. Dicta in *Redington* expressing reluctance to create an additional remedy when express remedies are already provided is not controlling in this case. In *Redington*, while the Court declined to decide the issue, *see* 442 U.S. at 574, it did note the existence of legislative history supporting a finding that the express remedies were intended to be exclusive. *See id.* at 573 & n.15. No such evidence exists here.

[30] In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer

that provision, a defendant may be held liable even for negligent misstatements. Because of its broader liability, section 11's reach is limited by restrictions on the class of plaintiffs to whom its remedy is available and by a short and strict statute of limitations. To no one's surprise, the remedy is unavailable to Wachovia on both counts: no registration statement was filed, and the suit was brought well beyond the time allowed under section 11.

Nothing in the remedy expressly provided by section 11 is inconsistent with an implied right of action under section 10(b). Under 10(b), negligence is not enough—one is liable only for fraud. The higher burden of proof under section 10(b) is clearly a trade-off for the limitations on

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at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

Section 11(a), 15 U.S.C. § 77k(a) (1976).

section 11 claims, and it accounts in part for the fact that there are two separate sections dealing with related problems. *See Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 786-87 (2d Cir. 1951); *Beecher v. Able*, 435 F. Supp. 397, 412 (S.D.N.Y. 1977). *See also Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1284 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (same argument applied when implying remedy under section 17(a) of the 1933 Act). Moreover, according to the view urged by cross-appellants, section 10(b) would serve no useful function because fraud is included within the broad proscription of section 11. Indeed, if no remedies may be implied under 10(b), investors defrauded in a purchase of unregistered securities are left less protected than investors suffering losses as the result of typographical errors in a registration statement.

For the same reasons, implying a remedy under section 10(b) creates no danger of circumvention of section 12(2) of the 1933 Act,[31] which deals with false prospectuses and

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[31] Any person who—

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(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for

oral communications. The cause of action expressly provided by that section is available in the event of negligent misstatements, and again the more stringent fraud requirement of section 10(b) serves as a trade-off for section 12(2)'s short statute of limitations and apparent restriction of defendants to sellers of securities. *See Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 461 F. Supp. 999, 1006 (D.D.C. 1978). *See also In re New York City Municipal Securities Litigation*, MDL No. 314 M 21-22, slip op. at 16 & n.20 (S.D.N.Y. Jan. 25, 1980) (using similar analysis to approve section 10(b) suit by purchasers of municipal securities foreclosed from using express remedy of section 12(2), which exempts government securities).

Finally, cross-appellants point to section 18 of the 1934 Act[32] as providing an express remedy that precludes im-

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such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 12(2), 15 U.S.C. § 77*l*(2) (1976).

[32] Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

Section 18(a), 15 U.S.C. § 78r(a) (1976).

plication of a cause of action under section 10(b). Section 18 makes any person filing a "false or misleading" statement with the SEC liable for damages caused by reliance on that statement. Cross-appellants' contention was recently considered and rejected by the Second Circuit in *Ross v. A.H. Robins Co.*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2175 (1980). The court there discussed various differences between the two sections which militate against regarding them as mutually exclusive.

First, section 10(b) by its very terms has a much broader reach than does section 18. The latter, noted the Second Circuit, has "the narrow and particularized objective of encouraging use of and reliance upon records filed with the S.E.C." *Ross*, 607 F.2d at 556. Section 18 therefore requires that plaintiffs prove actual reliance on particular filed statements, whereas section 10(b) presumes reliance if the omission is material or if the misstatement affects the price of the stock.

Second, section 10(b) imposes a more stringent burden of proof on plaintiffs—proof of actual fraud. Under section 18, a plaintiff need only show that a filed document contains a material omission or misstatement and that he relied on that document. The defendant then has the onus of establishing his good faith and lack of knowledge of the falsity. This distinction is noteworthy because, as the court noted in *Ross*, "the ultimate outcome of the litigation may hinge upon who bears the burden of establishing the defendant's state of mind." 607 F.2d at 556.

In addition to pointing out the differences between the express remedy of section 18 and an implied remedy under section 10(b), the Second Circuit also reasoned that a holding that the section 18 remedy is exclusive would be incongruous. Whether a misstatement occurs in a filed or

unfiled document has no bearing on the damage resulting from an investor's reliance on that document and therefore should not be considered significant. Moreover, if section 18's remedy is deemed exclusive, corporate managers will have an incentive to file misleading documents with the SEC in order to limit their liability to those few who can prove actual reliance on the documents. The very purpose of section 18—encouraging reliance on filed records—would be substantially frustrated.

We find *Ross* persuasive support for our holding that a cause of action may be implied under section 10(b), irrespective of the availability of the express remedies provided by other sections of the securities laws. By approving an implied remedy under section 10(b), we do not pave the way for circumvention of the limitations on the express remedies. The absence of similar restrictions in section 10(b) suits is counterbalanced by that section's stricter burden of proof. The various remedies are aimed at righting different wrongs, and no one of them should therefore be considered exclusive.[33]

Even if we were inclined to hold that the express remedies were intended to be exclusive, they should only preclude implied causes of action in those cases in which they truly constitute "remedies." Where, as here, those express remedies are not available to a plaintiff or do not

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[33] Other courts have agreed that the remedies of the two Acts are cumulative and that plaintiffs have a choice in the event of overlap. *See Shaefer v. First Nat'l Bank*, 509 F.2d 1287, 1292 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Wolf v. Frank*, 477 F.2d 467, 475 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973); *Rekant v. Desser*, 425 F.2d 872, 882 (5th Cir. 1970); *Jordan Bldg. Corp. v. Doyle, O'Connor & Co.*, 401 F.2d 47, 51 (7th Cir. 1968); *Matheson v. Armbrust*, 284 F.2d 670, 674 (9th Cir. 1960). *But see McFarland v. Memorex Corp.*, 493 F. Supp. 631, 655 (N.D. Cal. 1980).

adequately dispose of his claim, an implied remedy is appropriate.[34]

In this case, relief was not available to Wachovia under any of the aforementioned provisions. The scope of section 11 of the 1933 Act is restricted to false registration statements, and the transaction here, because it did not involve a public offering, was not subject to the registration requirement. *See* section 4(2) of the 1933 Act, 15 U.S.C. § 77d(2) (1976). Cross-appellants may not be sued under section 12(2) of the 1933 Act, which limits potential defendants to sellers. *See Wachovia,* 461 F. Supp. at 1006; *Collins v. Signetics Corp.,* 605 F.2d 110, 113 (3d Cir. 1979); *DeMarco v. Edens,* 390 F.2d 836, 841 n.3 (2d Cir. 1968). Finally, plaintiffs have not claimed reliance on any documents filed with the SEC and thus may not bring suit under section 18 of the 1934 Act. Moreover, they have alleged materially false statements which were never contained in a filed document and which are thus exempt from section 18 liability. *See Wachovia,* 461 F. Supp. at 1006.[35]

In contrast to the inapplicability of the express remedies provided by the 1933 and 1934 Acts, an action under sec-

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[34] Even those few district courts holding that plaintiffs are limited to the express remedy of § 18 have done so only with respect to particular documents filed with the SEC. *See, e.g., McKee v. Federal's Inc.,* [Current] FED. SEC. L. REP. (CCH) ¶ 96,958 (E.D. Mich. 1979); *Pearlstein v. Justice Mortgage Investors,* [Current] FED. SEC. L. REP. (CCH) ¶ 96,760 (N.D. Tex. 1978); *Berman v. Richford Indus., Inc.,* [1978] FED. SEC. L. REP. (CCH) ¶ 96,518 (S.D.N.Y. 1978); *Kulchok v. Government Employees Ins. Co.,* [1977-1978] FED. SEC. L. REP. (CCH) ¶ 96,002 (D.D.C. 1977).

[35] Cross-appellants also mention the express private right of action provided by § 15 of the 1933 Act, 15 U.S.C. § 77*o* (1976). That section imposes secondary liability on the controlling persons of NSMC, but no suit could have been maintained under § 15 against cross-appellants, who are not controlling persons. *See Safeway Portland Employees' Federal Credit Union v. C.H. Wagner & Co.,* 501 F.2d 1120, 1124 & n.17 (9th Cir. 1974).

tion 10(b) is particularly appropriate here. That provision is concerned with the type of fraud alleged by plaintiffs—"a complex market manipulation rather than individual misstatements or omissions." *Wachovia,* 461 F. Supp. at 1007; *see Blackie v. Barrack,* 524 F.2d 891, 903 n.19, 907 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976). Appellants should, therefore, be able to maintain a cause of action under section 10(b), the only true relief available to them. We hold that appellants may pursue their claims under that section, regardless of whether an alternative remedy is available to them under some other section of the 1933 or 1934 Act.

It has become fashionable to challenge the existence of any implied remedies, as evidenced by the ever-increasing frequency with which the question has been presented to the Supreme Court and to other courts. *See Redington,* 442 U.S. at 562. We find nothing in the opinions of either the Supreme Court or of the other courts of appeals to warrant the suggestion that implied remedies no longer exist. Most recently, the Court of Appeals for the Second Circuit found a private remedy implied by the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (1976). *See Leist v. Simplot,* 49 U.S.L.W. 2056 (July 22, 1980). That case arose out of the notorious Maine potato futures default. The defendants urged the court to deny a private remedy because Congress had amended the Commodity Exchange Act in 1974 and had failed to include an express private remedy in the sections pertinent to the case. The court pointed out:

> The existence of an implied right of action under the Act as it stood in 1974 was repeatedly called to the attention of, and implicitly approved by, Congress. When a principle has become settled through court

> decisions, there is no occasion for Congress to speak unless it wishes a change.

Id.

As we noted above, the securities laws have been addressed by Congress on numerous occasions since 1934, most recently in 1975. Obviously, if Congress had wished to disapprove the judicial implication of a private remedy under section 10(b), it had an opportunity to do so. The silence is significant. *Cf. Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers,* 367 U.S. 396, 409 (1961).

The court in *Leist* also addressed the argument that the Supreme Court has changed the law of implied remedies. After reviewing the Court's recent opinions, which we have discussed above, the Second Circuit rejected the argument, saying

> [t]he effect of these decisions is simply to emphasize that the ultimate touchstone is congressional intent and not judicial notions of what would constitute wise policy.

49 U.S.L.W. at 2057. We read those cases alike. Just as it would be lawmaking for the courts to decide what good policy is in the first instance, so too the courts ought not retract for policy reasons a longstanding doctrine of legislative interpretation, especially one impliedly approved by Congress. It is the prerogative of Congress, presumed to be aware of how its enactments have been treated, to sound the call for a new direction.

IV. Conclusion

It is more than a decade since the collapse of NSMC stock, and long past time that appellants be given an opportunity to pursue the substance of their claims and, if appropriate, to recover for losses incurred as NSMC shareholders and alleged victims of securities fraud. We reverse the holding of the court below that it is the two-year statute of limitations for the District of Columbia's blue sky law that applies here and the holding that the doctrine of equitable tolling is unavailable to appellants. Accordingly, we find that this action is not time-barred under the District's three-year limitations period for general fraud claims.

We hold further that appellants may rely on a remedy implicit under section 10(b) of the 1934 Act, irrespective of the possibility of overlap between that implied cause of action and express remedies provided by other sections of the securities laws. Section 10(b) is peculiarly appropriate to the allegations of fraud made by appellants, and we find nothing in the legislative history of the securities laws or in recent Supreme Court opinions inconsistent with an implied right of action under section 10(b).

Reversed and remanded.

Opinion of United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

M.D.L. No. 105

Civil Action No. 166-73

WACHOVIA BANK AND TRUST CO., N.A., *et al.*,

Plaintiffs,

v.

NATIONAL STUDENT MARKETING CORP., *et al.*,

Defendants.

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Before

BARRINGTON D. PARKER
United States District Judge

Decided: November 20, 1978

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

In this private federal securities laws litigation, filed by the Wachovia Bank and Trust Company and other plaintiffs[1] (the Wachovia plaintiffs), two questions are presented for the Court's resolution. First, do the plaintiffs have implied causes of action under § 17(a) of the Securities Act of 1933 (1933 Act)[2] and §§ 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934 (1934 Act)?[3] Second, is this private action, brought under these statutory sections,

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[1] This is one of several private law suits growing out of the National Student Marketing Corporation stock fraud scheme. M.D.L. No. 105. The plaintiffs in this proceeding are Wachovia Bank and Trust Co., First Wisconsin Trust Co., The Dreyfus Offshore Trust, and the National Fire Insurance Company of Hartford. *See* note 7 *infra*.

[2] 15 U.S.C. § 77q(a).

[3] 15 U.S.C. §§ 78j(b), 78m(a) and 78n(a).

barred by the applicable statute of limitations and, if so, is there an independent cause of action based on common law fraud, breach of fiduciary duty and legal malpractice?

These issues have been raised by the law firm of White & Case, Marion J. Epley, a partner, and the accounting firm of Peat, Marwick, Mitchell & Co. (Peat Marwick).[4] The defendants have moved for judgment on the pleadings under Rule 12(c), Federal Rules of Civil Procedure, or alternatively to dismiss the complaint with prejudice under Rule 12(b)(6).

The Court has considered the various memoranda, affidavits and exhibits filed as well as the oral argument of counsel. For the reasons set forth herein the Court finds that plaintiffs have stated a private cause of action under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act and, therefore, defendants' motion for judgment on the pleadings on the issue of implied causes of action is denied. However, the Court agrees with the defendants on the statute of limitations issue and concludes that the federal claims asserted by plaintiffs are time-barred and the remaining claims must be dismissed for lack of pendent jurisdiction.

Introduction

In late 1969 when the economic fortunes of the National Student Marketing Corporation (NSMC) were most favorable and the reports on its financial operations extremely optimistic, the Wachovia plaintiffs purchased at a private placement nearly five million dollars worth of that corporation's stock. The terms of the purchase were governed by two contracts between the parties, dated December 17, 1969. White & Case, acting as NSMC's counsel, drafted

[4] The defendants also include Anthony M. Natelli and Joseph Scansaroli, members of Peat Marwick.

a Common Stock Purchase Agreement and issued a legal opinion to plaintiffs. Peat Marwick, the independent auditor of NSMC, certified the annual financial statements and played a role in preparation of interim financial reports and documents filed with the Securities and Exchange Commission (SEC).

In February of 1970, almost immediately following the Wachovia transaction, NSMC's fortunes suffered a sharp reversal and the stock's market price dropped markedly.[5] Shortly thereafter, in early 1970, two civil actions arising out of the collapse were filed in the Southern District of New York federal court. *Garber v. Randell,* (March 2, 1970); *Lipsig v. National Student Marketing Corp.,* (May 15, 1970) (naming Peat Marwick as defendant). In early 1972, a third action was filed in the Southern District, *Natale v. National Student Marketing Corp.,* (February 18, 1972) (naming White & Case as defendant).[6] Also, on March 19, 1970, a civil complaint was filed in the Southern District of Texas federal court. *Stuckey v. National Student Marketing Corp.,* (March 19, 1970). While White & Case and Peat Marwick were not parties in either *Garber* or *Stuckey,* the complaints outlined the alleged fraudulent scheme and financial manipulation that underlie the Wach-

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[5] The low bid price fell from 69½ on December 17, 1969, to 26 on February 17, 1970 (after giving effect to a two-for-one stock split). National Quotation Bureau Report, Dec. 1, 1976, at 16, 18.

[6] Marion J. Epley, III, was first named as a defendant in the Consolidated, Amended and Supplemental Complaint, *Garber v. Randell,* No. 70-835 (S.D.N.Y. June 2, 1972).

Taken together, the New York class action filings were complaints brought on behalf of all purchasers of NSMC stock who made their purchases between April 1, 1968, and February 17, 1972, and therefore included the Wachovia group as "asserted" class members. On November 29, 1972, following formal class certification and notice, the Wachovia plaintiffs officially "opted out" of the class.

ovia complaint. A complaint was also filed in October 1971 in the Southern District of Ohio, *Monroe v. Peat, Marwick, Mitchell & Co.*, alleging that the accountants aided and abetted others in misrepresenting Student Marketing's financial condition.

In February 1972, the SEC filed an enforcement and injunctive action against the major participants in the corporate acquisition and merger of National Student Marketing and Interstate National Corporation.[7] White & Case and Peat Marwick, among others, were named as defendants in that proceeding.

Despite this turn of events, more than three years elapsed after their December 1969 purchase before the Wachovia plaintiffs sought relief. On January 29, 1973, their original complaint was filed seeking damages from NSMC, several of its officers and employees; Peat Marwick, the partner in charge of the Washington, D.C., office, Anthony M. Natelli; and the auditor, Joseph Scansaroli. The complaint charged those named defendants with a conspiracy to defraud and violations of applicable federal securities laws in connection with plaintiffs' purchase of NSMC common stock in 1969.[8] The complaint did not include any common law counts.

On January 27, 1973, two days before this suit was filed, the Wachovia plaintiffs and the attorney-defendants entered into a letter agreement that the statute of limitations would be tolled for two years from that date as to them.[9]

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[7] *SEC v. National Student Marketing Corp.*, 457 F.Supp. 682 (D.D.C. 1978).

[8] The plaintiffs have since settled and dismissed their claims against NSMC and various named defendants.

[9] The tolling letter, dated January 27, 1973, provides that:

> White & Case and Mr. Epley are agreeable to the tolling of the statute of limitations for a period of two years from the date of this letter as to claims of [the plaintiffs] against White

By its terms, however, no claims could be asserted which were then barred by any applicable provision of law.

It was not until May 28, 1975, that the Wachovia plaintiffs amended their original complaint to include White & Case and Epley as defendants. The amended complaint charges those attorneys with various securities laws violations in addition to common law fraud, breach of fiduciary duty and legal malpractice.

In addition to the motions of the attorney and accountant defendants addressed in this opinion, the Wachovia plaintiffs seek to amend the original complaint, largely to raise common law fraud claims against Peat Marwick and the other remaining original defendants. Also before the Court is a motion of the defendant Roger O. Walther, a principal executive officer of NSMC and a major participant in its operations. He seeks to amend his answer to raise the statute of limitations defense.

THE IMPLIED CAUSES OF ACTION ISSUE

In seeking dismissal of all claims asserted under § 17(a) of the 1933 Act and §§ 10(b) or 14(a) of the 1934 Act,[10] the

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& Case and Mr. Epley arising out of the purchase of NSMC securities . . . in December, 1969. . . .

. . . .

In any such litigation or suit brought by [the plaintiffs] after termination or expiration of the tolling period, if White & Case and Mr. Epley plead the statute of limitations as to any claims by [the plaintiffs], it is further understood that any period during which the statute of limitations is tolled pursuant to this letter shall be excluded from the computation of the running of the limitation period. This letter shall not apply to and shall not revive any claims which [the plaintiffs], as of the date of this letter, are already barred from asserting by any applicable provisions of law.

[10] Plaintiffs' claim under § 13(a) of the 1934 Act has been abandoned.

defendants contend in substance that since certain provisions of the securities laws expressly provide private remedies for the conduct alleged here, the Wachovia plaintiffs cannot bypass the substantive and procedural limitations of those provisions by basing their claims for relief on judicially implied causes of action under the above-cited provisions. Resort to the express remedies is now time-barred and thus dismissal of the present implied claims would effectively foreclose any recovery under the federal securities laws. Plaintiffs strenuously object that their allegations encompass conduct which is not covered by the express provisions and which clearly falls within the recognized scope of implied causes of action.

The Court concludes that plaintiffs have stated a claim under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act. However, even assuming an implied action would be appropriate under § 14(a) of the 1934 Act, they have failed to state a claim under that provision.

Initially, it should be noted that defendants do not contest the implication of a private remedy under all circumstances, and for good reason, since an implied right of action has been recognized repeatedly under § 10(b), *see, e.g., Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 196, 96 S.Ct. 1375, 47 L. Ed. 2d 668 (1976); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.C. 723, 730, 95 S.Ct. 1917, 44 L. Ed. 2d 539 (1975). With less frequency and certitude, such an action has also been sanctioned under § 17(a), *see, e.g., Daniel v. International Brotherhood of Teamsters,* 561 F.2d 1223, 1244-45 (7th Cir. 1977), *cert. granted,* 434 U.S. 1061, 98 S.Ct. 1232, 55 L.Ed. 2d 761 (1978); *Forrestal Village, Inc. v. Graham,* 179 U.S. App. D.C. 225, 551 F.2d 411, 413 (1977); *but see Shull v. Dain, Kalman & Quail, Inc.,* 561 F.2d 152, 159 (8th Cir. 1977), *cert. denied,* 434 U.S. 1086,

98 S.Ct. 1281, 55 L.Ed. 2d 792 (1978). Rather, the defendants urge that where an express remedy covers the conduct alleged, judicial implication of a cause of action is not necessary to effectuate the goals of the securities laws. *See Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 477, 97 S.Ct. 1292, 51 L.Ed. 2d 480 (1977); *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 41, 97 S.Ct. 926, 51 L.Ed. 2d 124 (1977). Thus, they do not appear to argue that implied actions under § 17(a) or § 10(b) are inapplicable to the conduct alleged, but only that such implied remedies are unnecessary under the facts and circumstances here presented since express remedies were available if the plaintiffs had chosen to use them.

Defendants contend that § 18(a) of the 1934 Act[11] and § 12(2) of the 1933 Act[12] provide remedies for the mis-

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[11] Section 18(a), 15 U.S.C. § 78r, provides:

> Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

[12] Section 12(2), 15 U.S.C. § 77l, provides:

> Any person who—
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> . . . .
>
> (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate

statements and omissions alleged by plaintiffs. Specifically, they assert that most, if not all, of the materially false and misleading statements are substantially contained in documents filed with the SEC and are thus subject to the remedy provided by § 18(a). Insofar as certain statements may not be contained in such filed documents, they urge that § 12(2) provides an adequate remedy.

This Court is not persuaded that these express remedies suffice to effectuate congressional intent, as indicated by the securities laws, to proscribe the type of fraudulent conduct alleged here. With limited exceptions, plaintiffs do not allege reliance upon documents filed with the SEC and, contrary to the position of defendants, such reliance is essential to recovery under § 18(a). *Heit v. Weitzen,* 402 F.2d 909, 916 (2d Cir. 1968), *cert. denied,* 395 U.S. 903, 89 S.Ct. 1740, 23 L.Ed.2d 217 (1969); *Gross v. Diversified Mortgage Investors,* 438 F. Supp. 190, 195 (S.D.N.Y. 1977). The fact that statements similar to those alleged by plaintiffs were also contained in documents filed with the SEC is insufficient; absent reliance upon the filing of the state-

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commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

ments with the Commission, § 18(a) is inapplicable.[13] In addition, plaintiffs have alleged materially false statements which were never contained in a document filed with the SEC and thus are clearly exempt from § 18(a) liability.

Defendants respond that the remedy for such nonfiled statements rests with § 12(2). That provision, however, contains a number of restrictions, based in large part on the fact that it reaches even negligent misstatements and omissions, and is not directed solely at the intentional fraud alleged here. It appears doubtful that Congress intended victims of intentional fraud to be limited to the negligence remedy provided by § 12(2). Moreover, there is some question whether the section applies to the present defendants since they were not "sellers" of the securities in question. *See e.g., In re Equity Funding Corp. of America Securities Litigation,* 416 F. Supp. 161, 181 (C.D. Cal. 1976). While such a restriction is appropriate in a negligence context, it clearly is unwarranted here where the participants are charged with intentional fraud.

In short, it appears that neither § 18(a) nor § 12(2) provides the plaintiffs with adequate remedies. If the Court were to recognize defendants' solution, the plaintiffs would be relegated to state courts to pursue their claims based on common law fraud. Such a suggestion needs little discussion. The gravamen of plaintiffs' complaint is that defendants participated in a scheme to manipulate the national market for NSMC stock through the broad dissemination of materially false and misleading state-

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[13] It is unclear whether reliance must be on the actual document filed with the SEC, or whether reliance on a copy of such document would suffice. The latter seems to be the more reasonable position since it is the knowledge that it has been filed with the Commission that justifies reliance on the document.

ments concerning NSMC. Such conduct is clearly a matter of federal, not state, concern. *See* 15 U.S.C. § 78b.[14]

Since this is not a case where the allegations in the complaint fall entirely within the scope of express provisions of the securities laws,[15] and since the allegations primarily

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[14] Section 78b, 15 U.S.C., provides:

> transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation . . . in order to protect interstate commerce, the national credit, . . . and to insure the maintenance of fair and honest markets in such transactions:
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> . . . .
>
> (3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation. . . .

[15] An implied cause of action should be available even where the alleged misconduct also falls completely within the confines of an express remedy. "The fact that there may well be some overlap is neither unusual nor unfortunate," *SEC v. National Securities, Inc.*, 393 U.S. 453, 468, 89 S.Ct. 564, 573, 21 L.Ed.2d 668 (1969), especially since recent developments have properly restricted such implied remedies to the scope authorized by specific statutory provisions. *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (materiality); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) (scienter); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) (purchaser/seller). Moreover, to conclude that express and implied causes of action should not overlap would require a case-by-case determination of the applicability of implied remedies under the particular factual situation presented. Such a procedure, especially in a pretrial stage when the factual bases for the various claims have not been developed, would significantly burden an already complex area of the law.

But see Kulchock v. Government Employees Insurance Co., [Transfer Binder '77-'78 Decisions] Fed. Sec. L. Rep. (CCH) ¶ 96,002 (D.D.C. 1977) (complaint dismissed on ground that there is no implied cause of action for misstatements in documents filed with the SEC because § 18 of the 1934 Act provides express remedy

concern a complex market manipulation rather than individual misstatements or omissions, *see Blackie v. Barrack,* 524 F.2d 891, 907 (9th Cir. 1975), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976), the Court concludes that plaintiffs have stated a claim under § 10(b) of the 1934 Act and § 17(a) of the 1933 Act.[16]

A different conclusion is reached with respect to plaintiffs' asserted cause of action under § 14(a) of the 1934 Act. To support such a claim, plaintiffs must allege an injury to their corporate suffrage rights or an injury resulting from a corporate transaction whose approval was obtained by a misleading proxy statement. *In re Penn Central Securities Litigation,* 347 F. Supp. 1327, 1342 (E.D. Pa. 1972), *aff'd,* 494 F.2d 528 (3rd Cir. 1974). In an attempt to meet the second part of the test, the Wachovia plaintiffs allege that the stock they purchased was authorized on the basis of the misleading NSMC proxy material concerning the Interstate transaction. The Court does not read the test so broadly. Plaintiffs' injury did not result from the authorization of the stock, but from their later purchase of it at an allegedly inflated price. To state a claim under the second part of the test, the alleged stock transaction must be part of the merger itself and not a subsequent transaction. Therefore, plaintiffs have failed to state a claim under § 14(a) and defendants' motion to dismiss claims

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for same); appeal of this dismissal Order withdrawn in light of final judgment and settlement, C.A. No. 76-206 (D.D.C. July 28, 1978).

[16] Since defendants' motions are primarily directed to the distinction between express and implied remedies, the Court need not consider the relationship between the two implied causes of action.

Defendants make other minor arguments in support of their motions to dismiss, none of which have merit.

asserted under that provision must be granted. Of course, to the extent allegations contained in these claims are also applicable to the alleged manipulative scheme, they are properly brought under § 10(b) and § 17(a). *See* 347 F. Supp. at 1342.

THE STATUTE OF LIMITATIONS ISSUE

A. Motion of White & Case and Epley

The District of Columbia Securities Act, the so-called "blue sky law," includes a statute of limitations which in part provides that:

> No person may bring an action under this section after two years from the contract of sale . . . .[17]

Only recently our Circuit ruled that when a private action is brought under § 10(b) of the 1934 Act and § 17(a) of the 1933 Act, this two-year blue sky period is the applicable statute of limitations. *Forrestal Village, Inc. v. Graham,* 179 U.S. App. D.C. 225, 551 F.2d 411 (1977). Since the Wachovia plaintiffs allege violations of §§ 10(b) and 17(a), and their other claims concern securities fraud, *Forrestal Village* mandates application of the two-year statute of limitations.

The pending claims against the attorney-defendants were not filed until May 1975, though, by virtue of the tolling letter, it must be assumed that theses claims were filed on January 27, 1973.[18] Both of these dates are more than two years after the December 17, 1969, contracts of sale. The defendants accordingly urge that the securities laws

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[17] D.C. Code § 2-2413(e) (1973).

[18] *See* p. 1004 and note 9.

claims are untimely filed under the blue sky law and should be dismissed with prejudice. Because plaintiffs' common law claims are allegedly dependent upon the time-barred securities claims, defendants contend that the Court should not exercise pendent jurisdiction over the state law claims.

Plaintiffs argue initially that *Forrestal Village* should not be applied retroactively and that they are entitled to the benefits of the D.C. three-year statute of limitations for common law fraud actions.[19] Citing the criteria of *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), they allege that *Forrestal Village* overrules the only precedent in the District and therefore creates a new principle of law which cannot fairly be applied retroactively.

The Court, in agreement with defendants, cannot accept this argument. Indeed, White & Case point out that prior law is by no means unequivocal, consisting largely of three unreported United States District Court cases, all of which barred actions under the three-year general fraud limitations period.[20] The *Forrestal Village* court did not announce a new general principle of law, but "join[ed] the majority of circuits" in applying a local blue sky law statute of limitations in securities fraud cases. 551 F.2d at 413. Lastly, this Court has already applied the decision retroactively. *Houlihan v. Anderson-Stokes,* 434 F. Supp. 1324 (D.D.C. 1977).

Having adopted the blue sky provision, the Court must next determine when the two-year period commenced to run. Plaintiffs' principal opposition to defendants' motion

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[19] D.C. Code § 12-301(8) (1973).

[20] *See* Reply by Defendants White & Case and Marion J. Epley, III, to Plaintiffs' Memorandum in Opposition to Motion to Dismiss the Complaint, August 26, 1977, at 18-22.

to dismiss is that the federal common law tolling doctrine is applicable and held the limitations period in abeyance until such time as the alleged fraud was or should have been discovered. They identify the relevant date as February 3, 1972, when the SEC filed its injunction action before this Court.[21] Only then, they contend, was it that "[t]he first hint of any participation by White & Case in the massive NSMC stock fraud surfaced . . . ." [22]

The federal tolling doctrine appears in *Bailey v. Glover*, where the Supreme Court announced that:

> the decided weight of authority is in favor of the proposition that where the party injured by the fraud *remains in ignorance of it without any fault or want of diligence or care on his part*, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1875) (emphasis added). Where federal securities laws violations are alleged, as here, this time-honored doctrine has been recognized to mean that the statute of limitations cannot be said to run until a plaintiff, in the exercise of reasonable diligence, discovered or should have discovered the fraudulent activity underlying his cause of action.[23] The law is also

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[21] *See* note 7 *supra*.

[22] Plaintiffs' Memorandum in Opposition to Motion by Defendants White & Case and Marion J. Epley, III, July 29, 1977, at 2.

[23] *Cook v. Avien, Inc.*, 573 F.2d 685, 694-95 (1st Cir. 1978); *Arneil v. Ramsey*, 550 F.2d 774, 780-01 (2d Cir. 1977); *Newman v. Prior*, 518 F.2d 97, 100 (4th Cir. 1975); *Tomera v. Galt*, 511 F.2d 504, 509 (7th Cir. 1975); *Hudak v. Economic Research*

clear that the statutory period will not await a plaintiff's leisurely discovery of the full details of the fraudulent scheme, but begins to run when plaintiff possesses sufficient information, which in the exercise of due diligence, warrants further inquiry.[24]

White & Case and Epley do not contend that the Wachovia plaintiffs had actual knowledge of their participation in the fraudulent scheme. Instead, they allege that the facts were such that plaintiffs, four large sophisticated institutional investors, should have formulated some suspicion against the law firm shortly after the private placement in 1969. Defendants label the following uncontroverted occurrences, established and known to the public in early 1970, as "code blue" alert notices of fraud:

> a. The precipitous decline of NSMC stock within sixty days after the plaintiffs' purchase, from 69½ on December 17, 1969, to 26 on February 17, 1970;[25]

Analysts, Inc., 499 F.2d 996, 1001-02 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 821 (1975); *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir. 1970), *cert. denied*, 400 U.S. 852, 91 S.Ct. 47, 27 L.Ed.2d 90 (1970); *Janigan* v. *Taylor*, 344 F.2d 781, 784 (1st Cir. 1965), *cert. denied*, 382 U.S. 879, 86 S.Ct. 163, 15 L.Ed.2d 120 (1965); *Long v. Abbott Mortgage Corp.*, 459 F.Supp. 108 (D. Conn. 1978).

[24] *Cook v. Avien, Inc.*, *supra* note 23, at 696; *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

[25] *See* p. 2 and note 5 *supra* and affidavit of Thomas D. Nurmi, filed October 26, 1977.

See also Hupp v. Gray, 500 F.2d 993, 996-97 (7th Cir. 1974) (dramatic fall in market price from $47 per share to $17.50 per share, rather than the $75 predicted to the purchaser, sufficient to put wholly unsophisticated investor on notice that "something was amiss"); *Robertson v. Seidman & Seidman*, [Current] Fed.Sec.L. Rep. (CCH) ¶ 96,420 (S.D.N.Y. May 3, 1978) (85% decline in value of stock over less than a year, among other signs, should have led plaintiff to suspect fraud). *See also Cook v. Avien, Inc.*, *supra* note 23, at 696.

b. The loss, ranging from 1.2 to 1.7 million dollars, reported in early 1970 by NSMC for the quarter ended November 30, 1969;[26] and

c. News articles reporting NSMC financial difficulties in *Barron's* (December 12, 1969) and *The Wall Street Journal* (February 17, 1970).

In addition to the above, it is established that in early 1970, key officials of two plaintiffs, The Dreyfus Offshore Trust (general counsel and vice president) and First Wisconsin Trust Company (investment analyst), commenced investigation and contemplated suit.[27]

The Court agrees that these facts, coupled with the several lawsuits filed in 1970, provided a clearly marked trail which, if pursued with diligence, would have led the plaintiffs to the fraud of the NSMC officials and to the attorney-defendants and their involvement in the stock sale. A statute of limitations does not become operative when a

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[26] This loss was reported in the national press, including the February 17, 1970, *Wall Street Journal*.

[27] Lawrence M. Greene, general counsel and vice president of Dreyfus, began investigating in January 1970. When questioned concerning the *Barron's* article of December 12, 1969, his deposition at p. 118 reads:

> Q. Is it your understanding that upon your review of the Barron's article in January of 1970 that any subsequent investigations you made with respect to National Student Marketing were in contemplation of litigation?
>
> A. I was greatly concerned when I read the article . . . . , and, in fact, *I was rather upset about it and I therefore began to investigate the situation more deeply.* Whatever I did following that in connection with looking into the facts is *all part and parcel of my turning the matter over to our counsel for litigation.* (emphasis added).

Robert G. Steffel, an investment analyst, testified that First Wisconsin Trust was contemplating suit in late 1970 or early 1971.

plaintiff discovers all aspects of a fraudulent scheme, but rather from the time when a clue to the facts, if pursued diligently, would lead to an uncovering of the general fraudulent scheme. *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975); *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

This situation is virtually indistinguishable from that in the recent § 10(b) case of *Robertson v. Seidman & Seidman*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,420 (S.D.N.Y. May 3, 1978). In that proceeding an investor asserted that the defendant-accountants certified false and misleading financial statements in a stock sale. The district court granted summary judgment and dismissed the complaint as time-barred, holding that the investor should have discovered the fraud more than two years before suit was filed. The investor relied upon the federal tolling doctrine, claiming ignorance of the accountants' role until a later time when the SEC announced proceedings against them. The court found that the investor should have discovered the fraud far earlier, because the evidence showed that in the intervening period: the stock dropped markedly in value; he had suspected fraud and had discussed it with his broker; and was aware of a class action suit arising out of the same stock offering, charging price inflation through dissemination of false and misleading information. While that class complaint did not specifically name the accountants, the court found that "the plaintiff should at least have been on notice that further inquiry into the fraudulent practices surrounding . . . the public offering would be prudent," *Robertson* at 93,518, and there were public facts available indicating the accountants' role.

There is no difference between *Robertson* and this action except for the involvement of accountants rather than

attorneys. That of course is of no consequence. The Wachovia plaintiffs knew that White & Case had drafted the Stock Purchase Agreement as well as the legal opinion to secure their purchase. Their blanket claim that before the SEC injunctive action was filed in 1972 they had no reason to suspect this "reputable and prestigious" law firm of any unlawful role in a stock sale is rejected. As responsible money managers and investors, they had a duty to pursue every aspect of the transaction, including the role of the legal counsel in such a suspect sale. Their experience and their access to highly specialized personnel and consultants imposed an obligation of reasonable diligence commensurate with their sophistication and standing in the financial community.

> Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. . . . The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.

Wood v. Carpenter, 101 U.S. 135, 141, 25 L.Ed. 807 (1879).

Plaintiffs argue that the question as to when they had knowledge of White & Case's fraud and the issue of reasonable care as grounds for tolling the statute are disputed factual issues and cannot be disposed of without a trial. The Court disagrees. *See Jones v. Rogers Memorial Hospital,* 143 U.S. App. D.C. 51, 53, 442 F.2d 773, 775 n.2 (1971). The National Student Marketing matters were consolidated for pretrial discovery and have been pending for more than

five years. All parties in this proceeding have conducted expensive, time consuming and exhaustive discovery. The papers, exhibits and argument on these motions have been especially thorough and, in this Court's opinion, if there are any undisclosed facts at this stage, their relevancy and materiality are minimal.

Taken as a whole, the record is more than sufficient to show that plaintiffs should have investigated the attorney-defendants' potential role in the suspicious sale and should have known of the fraud within the two-year statute of limitations, running immediately after the sale. Plaintiffs' complaint as to White & Case and Epley is untimely filed and the motion of these defendants to dismiss must be granted. With dismissal of the federal claims at this time, the pendent state common law claims fall as well. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Robertson v. Seidman & Seidman, supra,* at 93,519; *Hupp v. Gray,* 500 F.2d 993, 997 (7th Cir. 1974).

B. *Motion of Peat Marwick, Natelli and Scansaroli*

In seeking dismissal, the accountant-defendants adopt in large measure the White & Case and Epley argument that *Forrestal Village* controls and that, in this private action under §§ 17(a) and 10(b) of the federal securities laws, the applicable statute of limitations is the two-year provision of the District of Columbia blue sky law. To counter the federal tolling doctrine urged by the Wachovia investors, they point to the several private actions filed in the New York federal courts, particularly the *Lipsig* class action of May 15, 1970, the first to name Peat Marwick as a defendant. The accountant-defendants also argue that those law suits, together with other events and developments widely publicized in the financial community, were

yellow caution lights, all ignored by Wachovia. Since the complaint under consideration was not brought until January 29, 1973, the federal tolling doctrine does not protect the plaintiffs.

The plaintiffs on the other hand allege and urge that filing of the several New York class actions, of which they were asserted members, tolled the running of the limitations period. The *Lipsig, Garber* and *Natale* complaints were filed on behalf of NSMC shareholders who made their stock purchases between April 1968 and February 1972, and did indeed include plaintiffs as purported members. These actions were consolidated in April 1972 and later transferred by the Judicial Panel on Multidistrict Litigation to this Court for pretrial proceedings. The New York actions were certified as class actions and, during October 1973, notice of class action determination was sent to the various class members including the Wachovia plaintiffs.

In January 1973, however, the Wachovia plaintiffs had filed the present complaint naming Peat Marwick, Natelli and Scansaroli among the defendants. In justification for their course of action they asserted that their status as institutional purchasers made their complaint dissimilar to the earlier class actions. On November 29, 1973, they "opted out" to pursue their independent claims.

Peat Marwick argues that the Wachovia plaintiffs should have filed an action within two years of the 1969 purchase and that the January 1973 complaint is therefore time-barred. The accountant-defendants contend that the statute of limitations was not tolled by the various class actions, because by opting out, the plaintiffs forfeited any benefits accruing to the class members. As members in the earlier filed class action proceedings the Wachovia plaintiffs could

not exclude themselves from the class and then file law suits which otherwise would be time-barred.

The class action tolling doctrine is best illustrated in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), where the Supreme Court held that filing of a class action complaint tolls the running of the statute of limitations for all purported class members who timely seek intervention after the lower court has found the asserted class too small to certify. According to the Court, a contrary rule allowing participation only by those potential class members who had earlier filed motions to intervene would deprive class actions of the efficiency and economy of litigation which they are designed to promote. This rule is not inconsistent with the functional operation of a statute of limitations, since the policies of ensuring fairness to defendants and of barring plaintiffs who have slept on their rights are satisfied when a named plaintiff "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 554-55, 94 S.Ct. at 767.

In light of these policy considerations, this Circuit has called for a "broad, functional" reading of *American Pipe*.[28] *McCarthy v. Kleindienst*, 562 F.2d 1269, 1274 (D.C. Cir. 1977). The court there extended the *American Pipe* tolling doctrine to a case where a motion for class certification had been denied not because of size but on grounds of untimeli-

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[28] *See also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977) (potential class members could intervene after final judgment for the purpose of appealing the denial of class certification, even though the limitations period had run).

ness and nonpredominance of common questions. The court found that a motion to intervene brought by 266 asserted class members four years after the events at issue, but one day after denial of class certification, was timely, because there was no evidence of manipulative behavior by the plaintiffs and the defendants had received "sufficient notice of the contours of potential claims to toll the running of the statute of limitations." 562 F.2d at 1275. *See also United Airlines, Inc. v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

The *American Pipe* line of cases concerns the propriety of intervention following denial of class certification. Here, there has been certification of a class which includes the Wachovia plaintiffs. Before that certification decision, plaintiffs filed a separate action. Following certification, they opted out of the class rather than pursuing class relief. The broad issue here, therefore, is whether the policy considerations of *American Pipe* operate to toll the limitations period for all purported class members until certification is decided.

The Court finds that, under the circumstances presented here, the class action tolling doctrine does not protect the Wachovia complaint brought against the accountant-defendants. Preliminarily, the doctrine cannot operate against defendants Natelli and Scansaroli. Since they were not named in the original New York actions, they cannot fairly be charged with the notice requisite for class action tolling. Notice considerations also mean that the consolidated amended complaint naming them, filed on June 2, 1972, does not relate back for tolling purposes. *Arneil v. Ramsey,* 550 F.2d 774, 782 n. 10 (2d Cir. 1977).[29]

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[29] The amendment came more than two years after the *Lipsig* action naming Peat Marwick. Therefore, even if the latter suit

Insofar as Peat Marwick is concerned, plaintiffs base their opposition to the motion largely on a footnote in a Supreme Court class action decision following *American Pipe*. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), a case concerning notice to potential class members, the Court referred to *American Pipe* as establishing that

> commencement of a class action tolls the applicable statute of limitations as to all members of the class. 417 U.S. at 176 n.13, 94 S.Ct. at 2152.

While at least one court has found that this dictum "appears to have . . . eliminated" the general tolling question,[30] this Court is not so persuaded. There is precedent supporting an interpretation opposite to plaintiffs' in the Second Circuit. In *Arneil v. Ramsey, supra,* that court refused to toll the running of the statute of limitations for a separate action brought by two plaintiffs who were not asserted members of a class action as originally filed. *See also Stull v. Bayard,* 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied,* 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 783 (1978).

For the Court to find otherwise, that the class action filings tolled the limitations period for plaintiffs' separate suit, would sanction duplicative suits and violate the policies behind *American Pipe*. Even assuming that this action

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should have put plaintiffs on notice that individual accountants at Peat Marwick were involved in the fraud, the federal tolling doctrine cannot be added to the class action tolling doctrine to protect the suit against Natelli and Scansaroli.

[30] *Agostine v. Sidcon Corp.*, 69 F.R.D. 437, 448 n.13 (E.D. Pa. 1975) (Truth in Lending case). *See also McAlpine v. AAMCO Automatic Transmissions, Inc.*, 1977-1 Trade Cases ¶ 61,359 (E.D. Mich. 1977) (antitrust case—court found dicta "highly persuasive" and tolled the statute of limitations for damage purposes).

and the original class actions raise identical issues, the filing of a class action should not cause Peat Marwick to be responsible for meeting separate independent actions by class members after their statute of limitations has run. If different issues are raised, there is even less reason to credit Peat Marwick with notice.

The Court also finds it noteworthy that the plaintiffs filed this action before class certification had been decided. If, following certification, they had determined that the class action strategy would not protect their rights and had then promptly filed a separate action, their arguments might be more persuasive. By filing their action before a certification decision, opting out of the class after certification, and then claiming the benefits of tolling, they appear to have been manipulating the tolling doctrine and other class action procedures. While the Court is aware that *American Pipe* had not been decided as of January 29, 1973, when plaintiffs filed this action, their delay is not justifiable in light of the traditional purposes of a statute of limitations.

Since the Wachovia plaintiffs are not protected by the class action tolling doctrine, their complaint against Peat Marwick was not timely filed and must be dismissed. In light of this disposition, it is not necessary for the Court to address Peat Marwick's contention that the instant action does not involve the same issues raised in the New York actions.

Other Motions

a. In light of the Court's dismissal of the Wachovia plaintiffs' complaint against the accountant-defendants, the motion of the plaintiffs to amend the complaint to add common law fraud claims against Peat Marwick, Natelli and

Scansaroli is denied. The Court would not exercise pendent jurisdiction over such state claims if the amendment were allowed. *See* p. 12 *supra*.

The motion to amend will also be denied insofar as plaintiffs seek to amend the caption to reflect the parties who have not settled, given that various cross-claims are pending and such a technical change is not necessary. The motion will be granted, at this time, only insofar as plaintiffs seek to delete references to § 13(a) of the 1934 Act under the Count I heading.

b. The Court finds that defendant Walther's motion to amend his answer to raise a statute of limitations defense is appropriate. In light of the pleadings that have been filed on this issue, the plaintiffs will not be prejudiced by the amendment.

c. The motion of the Wachovia plaintiffs to compel White & Case and Epley to produce documents, memoranda allegedly prepared for counsel, does not bear on the factual issues involved in these motions and will be denied as moot.

ORDERED accordingly.

Entered: November 20, 1978

BARRINGTON D. PARKER
United States District Judge

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1595

September Term, 1980

Argued 12-13-79

WACHOVIA BANK AND TRUST CO., N.A. (as Trustee and Agent for various trust accounts), *et al.*

Appellants

v.

NATIONAL STUDENT MARKETING CORPORATION, *et al.*,

And consolidated cases

Before:

ROBINSON and MIKVA, *Circuit Judges*;

FLANNERY, *Judge, United States District Court for the District of Columbia*

ORDER

This matter is before the Court for consideration of the petitions for rehearing of Peat, Marwick, Mitchell & Co., Anthony M. Natelli and Joseph Scansaroli, White and Case and Marion Jay Epley, III, Joy Walther, Donald A. Fergusson and Robert A. Fergusson, and the motion of Cortes W. Randell for leave to file petition for rehearing out of time, it is

Order Denying Rehearing

ORDERED by the Court that the motion of Cortes W. Randall for leave to file out of time is denied, and, it is

FURTHER ORDERED by the Court that all of the aforesaid petitions for rehearing are denied.

Per Curiam

FOR THE COURT:

George A. Fisher, *Clerk*

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

FILED MARCH 4, 1981

GEORGE A. FISHER, *Clerk*

Order Denying Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1595

September Term, 1980

Civil Action No. 166-73

Argued 12-13-79

WACHOVIA BANK AND TRUST CO., N.A. (as Trustee and Agent for various trust accounts), *et al.*

Appellants

v.

NATIONAL STUDENT MARKETING CORPORATION, *et al.*,

And consolidated cases

Before:

McGOWAN, *Chief Judge;*

WRIGHT, TAMM, ROBINSON, MacKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, *Circuit Judges*

ORDER

This matter is before the Court for consideration of the suggestions for rehearing *en banc* of Peat, Marwick, Mitchell & Co., Anthony M. Natelli and Joseph Scansaroli, White and Case and Marion Jay Epley, III, Joy Walther, Donald A. Fergusson and Robert A. Fergusson. These suggestions

have been circulated to the full Court. A majority of the judges have not voted in favor of rehearing this matter *en banc*. On consideration of the foregoing, it is

ORDERED by the Court *en banc*, that all of the aforesaid suggestions are denied.

Circuit Judges MacKinnon and Robb would rehear these cases *en banc*.

Circuit Judge Wright did not participate in the foregoing order.

Per Curiam

FOR THE COURT:

George A. Fisher, *Clerk*

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

FILED MARCH 4, 1981

GEORGE A. FISHER, *Clerk*

Securities Act of 1933

§ 5, 15 U.S.C. § 77e (1976)

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title.

It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the

purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

* * *

§ 11, 15 U.S.C. § 77k (1976)

§ 77k. Civil Liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state

a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document,

he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for relief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the dif-

ference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon

the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability

All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

§ 12, 15 U.S.C. § 77*l* (1976)

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

§ 13, 15 U.S.C. § 77m (1976)

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event

shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale.

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§ 16, 15 U.S.C. § 77p (1976)

§ 77p. Additional remedies

The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

§ 17, 15 U.S.C. § 77q (1976)

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) Use of interstate commerce for purposes of offering for sale

It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) Exemption of section 77c not applicable to this section

The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

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Securities Exchange Act of 1934

§ 9, 15 U.S.C. § 78i (1976)

§ 78i. Manipulation of security prices

(a) Transactions relating to purchase or sale of security

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising

or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to puchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to puchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market

operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Transactions relating to puts, calls, straddles, or options

It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest

in any such put, call, straddle, option, or privilege with relation to such security.

(c) Endorsement or guarantee of puts, calls, straddles, or options

It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) Registered warrant, right, or convertible security not included in "put", "call", "straddle", or "option"

The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(e) Persons liable; suits at law or in equity

Any person who wilfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

§ 10, 15 U.S.C. § 78j (1976)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

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Securities Exchange Act of 1934

§ 18, 15 U.S.C. § 78r (1976)

§ 78r. Liability for misleading statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may use at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Contribution

Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) Period of limitations

No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

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§ 28(a), 15 U.S.C. § 78bb(a) (1976)

§ 78bb. Effect existing law

(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.